89-914

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

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NATIONAL POSTERS, INC., AND NATIONAL LITHO,
A DIVISION OF NATIONAL POSTERS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

———

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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MAURICE BASKIN *
VENABLE, BAETJER, HOWARD
& CIVILETTI
1301 Pennsylvania Avenue, N.W.
Suite 1200
Washington, D.C. 20004
(202) 662-4300
Attorneys for Petitioner

Date: December 11, 1989 * Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether This Court Should Resolve a Conflict Within the Circuits Concerning the Proper Standard for the Enforcement of Bargaining Orders Issued by the National Labor Relations Board, Where the Board Has Failed to Consider Or Properly Address the Effects of Changed Circumstances Resulting From the Board's Own Unexcused Delays In Processing A Case.

2. Whether the Board's Bargaining Order in the Present Case Should Be Enforced.

LIST OF PARTIES

The present Petitioner, National Posters, Inc. and National Litho, a Division of National Posters, Inc., was party to a final judgment of the United States Court of Appeals for the Fourth Circuit from which certiorari is being sought.

In *National Posters, Inc. v. NLRB*, 855 F.2d 175 (4th Cir. 1989) (*National Posters II*), and 720 F.2d 1358 (4th Cir. 1983) (*National Posters I*), National Posters, Inc. was a petitioner and cross-respondent and the National Labor Relations Board was a respondent and cross-petitioner. Local 61-C of the Graphic Communications International Union intervened in *National Posters II*.[1]

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[1] Pursuant to Rule 28.1 Petitioner National Posters, Inc. states that it is affiliated with National Litho, National Graphics, Inc. National Printing Prep, Inc., and National Decal, none of which are publicly held or publicly traded corporations.

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OPINIONS BELOW

Certiorari is being sought from a final judgment of the United States Court of Appeals for the Fourth Circuit. The decision of that court dated September 13, 1989 (*National Posters II*), is reported at 885 F.2d 175. (App. 1a). A previous decision of the same court in the same matter (*National Posters I*) is reported at 720 F.2d 1358 (4th Cir. 1983). (App. 14a).

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered final judgment in this case on September 13, 1989. Jurisdiction to hear this case is conferred on this Court by 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The following provisions are pertinent to this case:

29 U.S.C. § 157 provides in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . .

29 U.S. § 158(a)(5) provides:

> It shall be an unfair labor practice for an employer—(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 159(a) of this title.

29 U.S.C. § 159 provides in pertinent part:

> (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:
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> * * * *
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> (c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board
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> (B)(a) . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice.

29 U.S.C. § 160(c) provides in pertinent part:

> The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaged in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: . . .

29 U.S.C. § 160(e) provides in pertinent part:

> The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board.

29 U.S.C. § 160(f) provides in pertinent part:

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; . . .

STATEMENT OF THE CASE

This petition for writ of certiorari seeks plenary review of the Fourth Circuit's decision in *National Posters, Inc. v. NLRB*, 885 F.2d 175 (4th Cir. 1989) (*National Posters II*) (App. 1a), and 720 F.2d 1358 (4th Cir. 1983) (*National Posters I*) (App. 14a). In *National Posters II*, the Fourth Circuit denied a petition for review of a bargaining order issued by the National Labor Relations Board, eight years after the disputed election on which the bargaining order was based. The Fourth Circuit granted enforcement of the Board's order, notwithstanding the Board's refusal to consider the effects of changed circumstances resulting from the Board's own unexcused delays in processing the case.

A. The Board's Initial Failure To Hold a Post-Election Hearing.

This action began on December 15, 1981, when the employees of National Posters, Inc., and National Litho (the "Petitioner" or the "Company"), voted in a secret ballot election to decide whether they would be exclusively represented by Local 61 of the Baltimore Printing Pressman and Assistants Union ("Local 61"). The principal issue in the campaign was the Company's decision to cut insurance benefits due to recent economic losses. The tally of ballots showed that 24 employees voted for Local 61, 21 voted against the union and four ballots were challenged, a number sufficient to affect the results of the election. (App. 31a).

Petitioner challenged the eligibility of one of the voters, contending that he was ineligible due to his seasonal, temporary status. Petitioner also filed objections to the results of the election, contending that Local 61 had committed misrepresentations so serious as to improperly affect the outcome of the election. (App. 31a). Specifically, the Company alleged that in the week prior to the election, Union representatives falsely told numerous employees that the Company President had spent large sums of money on gifts for his children, including the purchase of a large farm for his daughter. Petitioner further alleged that the Union had materially misrepresented its pension plan and health and welfare benefits as well as the amount of the union's dues. The Petitioner supported its allegations with sworn affidavits.

On March 16, 1982, without holding a hearing, the Regional Director for Region 5 of the National Labor Relations Board (the "Board") issued a Report on Challenges and Objections. The Board overruled the Company's challenge to the ballot of the allegedly seasonal, temporary voter, notwithstanding the Company's evidence of the employee's seasonal status. The Board also over-

ruled the Company's objections, without passing on the truth of the Company's evidence, finding that the allegations were not sufficient to justify setting aside the election. (App. 31a).

After opening two of the challenged ballots, the revised tally became 25 to 22 in favor of Local 61, with the two remaining ballots challenged by the Union left unopened. Accordingly, on July 14, 1982, the Regional Director issued a Certification of Representation to Local 61 for the unit consisting of "all production and maintenance employees including truck drivers" employed by the Petitioner at its two plants. Petitioner refused to bargain in order to test the validity of the certification. (App. 66a).

B. The Court of Appeals' Remand.

Petitioner filed a Petition for Review of the Board's subsequent Bargaining Order with the United States Court of Appeals for the Fourth Circuit. (App. 50a). Petitioner contended, *inter alia*, that the Board's failure to hold a hearing or set aside the election on the misrepresentation issues deviated without explanation from established Board law. Petitioner further argued that the Board's failure to hold a hearing on Petitioner's challenged ballot was arbitrary and capricious.

The Court of Appeals agreed with Petitioner as to the second issue and vacated the Board's decision, finding that the Board violated the Act by failing to conduct a hearing on Petitioner's challenge to the ballot of its temporary worker. *National Posters I*, 720 F.2d 1358 (4th Cir. 1983). (App. 14a). With regard to the campaign misrepresentation issue, the court did not reach the question of whether the Board misapplied its previous policy. By the time the court heard the case, the Board had changed its policy on election campaigns altogether, allowing either side to commit misrepresentations with impunity. The Court of Appeals permitted the Board's retroactive ap-

plication of its new policy on misrepresentations to the facts of this case. (App. 26a).[2]

C. The Board's Belated Hearing and Subsequent Unexcused Delay.

Pursuant to the Court's remand, the Board ordered a hearing on the issue of whether the temporary worker should have been considered eligible to vote. (App. 14a). The Board also ordered that the same hearing consider the status of the two remaining challenged ballots. Said hearing was held on June 12, 20 and 21, 1984, before the Honorable Bernard Ries, Administrative Law Judge. On November 23, 1984, Judge Ries ruled that the temporary employee and one other challenged voter should be counted as eligible voters while the remaining ballot should not be counted. (App. 66a).

Petitioner filed timely exceptions to the judge's decision. The Board failed to act on these exceptions, however, for approximately two-and-one-half years. Finally, without any excuse or explanation for the delay, the Board affirmed the judge's findings concerning all challenged ballots on February 4, 1987. *National Posters, Inc.*, 282 NLRB No. 148 (1987). (App. 62a).

D. Post-Election Changes in the Union Seeking Representation.

On or about July 1, 1983, the International Printing and Graphic Communications Union (the "IPGCU"), the international governing body of Local 61, merged with the Graphic Arts International Union (the "GAIU") to form the Graphic Communications International Union (the

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[2] Because the court in *National Posters I* remanded the case for further proceedings, its retroactive application of the Board's new misrepresentation policy did not constitute a final judgment and is subject to review by this Court in the present proceeding. *See Local 28, Sheet Metal Workers' International Assn. v. EEOC*, 478 U.S. 421, 444, n.24 (1986); *see also* 1B J. Moore, J. Lucas & T. Currier, *Moore's, Federal Practice* ¶ 0.404 at 141 (2d ed. 1988).

"GCIU"). (App. 63a). Local 61 subsequently altered its bylaws, officers, dues and office location, among other things, and became Local 61-C of the GCIU ("Local 61-C"). (App. 119a). The Union failed to notify either the Petitioner or the Board of the changes in its organization and did not seek amendment of its certification.

After subsequently learning of these events, however, Petitioner moved to reopen the record, contending *inter alia* that the post-merger union lacked continuity with the union on which the employees voted due to the substantial changes which had taken place at both the local and international levels of the union. (App. 63a). The Board granted Petitioner's motion to reopen the record, in part, in its Order of February 4, 1987, holding as follows:

> We find, in agreement with the [Petitioner] that a reopening of the record in this case is necessary to determine if the merger between International Printing and Graphics Union [sic], and Graphic Arts International Union, so substantially changed Local #61, as to raise a question concerning its continued status as the certified bargaining representative of the Petitioner's unit employees.

(App. 63a). A hearing was held before Judge Ries on July 29, 1987 on the union merger issue.

In the hearing, Petitioner presented additional evidence of changes in the union's local and international structure, as well as the level of autonomy of the local vis-a-vis the new international entity. Nevertheless, in his Second Supplemental Decision of February 11, 1988, the judge found that "the 1983 merger of the International Unions did not cause a substantial change in the identity of Local 61-C and a consequent lack of continuity of representation by Local 61-C with respect to the [*Petitioner's*] employees in the certified unit." (App. 156a). He therefore recommended that the Board's original bargaining order be reissued.

E. Failure of the Board to Consider Evidence of Substantial Change in the Bargaining Unit.

Petitioner filed exceptions to the judge's second decision and a second Motion to Reopen the Record, or in the alternative, for Reconsideration, so as to present new evidence of changes in the bargaining unit in light of the Board's recent decision in *St. Regis Paper Co.*, 285 NLRB No. 39 (August 10, 1987). (App. 119a). The Petitioner's evidence showed that 18 of the original 55 employees had left the bargaining unit since 1981, that the total number of employees had expanded through new hires to 137, and that only thirty-seven of the then current 137 employees were employed at the time of the election. In addition, none of the ten on-call employees employed at the time of the election worked any longer for Petitioner. (App. 157a).

Petitioner further contended that the issues on which the union won its disputed victory in 1981 were no longer relevant to the existing complement of employees. Finally, Petitioner argued that the present employees should not be compelled to accept Local 61-C as their exclusive representative based on a disputed vote by a much smaller group of different employees pertaining to a different union campaigning on different issues and relying on material misrepresentations. (App. 119a).

Notwithstanding this evidence, on June 30, 1988, the Board entered its Supplemental Decision and Order rejecting Petitioner's contentions and refusing even to consider the effect of changed circumstances on the employees' choice of representative. (App. 50a). The Board ordered that the Petitioner bargain with Local No. 61-C and reissued its prior Order of December 10, 1982. On August 22, 1988, the Petitioner filed a petition with the Fourth Circuit to review and set aside the Orders of the Board.

F. The Court of Appeals' Final Decision.

On September 13, 1989, in *National Posters II*, the Fourth Circuit granted enforcement of the Board's order. (App. 1a). The Court of Appeals found that the Board's findings with regard to the challenged ballot were supported by "substantial evidence" and that the Union's reaffiliation, in and of itself, had not so fundamentally altered its identity as to raise a new question concerning representation. (App. 7a, 11a). Finally, the court refused to require the Board to consider the Petitioner's proffered evidence of change in the bargaining unit resulting from the Board's own delay in processing the case. (App. 13a).[3]

With regard to the issue of unusual delay, the Court of Appeals acknowledged that other circuit courts have declined to enforce NLRB bargaining orders because of such delay, attributable to the NLRB, in the resolution of election disputes. (App. 11a). The court further conceded that "in some cases, courts have noted that employee turnover during such delays may call into question the continuing validity of close election results." (*Id.*). The court also recognized that in most of these decisions, "the refusal to enforce bargaining orders was justified on traditional principles of equity." (*Id.*). Finally, the court noted that "the NLRB's disposition of this case has been no model of administrative efficiency. Almost two and a half years elapsed after the first hearings on . . . voter eligibility and the NLRB's decision.

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[3] Petitioner continues to challenge the correctness of each of the lower court's rulings, including those with regard to the challenged ballot, the change in the union's identity, and the unusual changed circumstances resulting from the Board's delay. In addition, contrary to the Court of Appeals' assertion, Petitioner has not "abandoned" its claim from *National Posters I* that union misrepresentations unfairly prejudiced the election. (App. 3a, n.1). Rather, the court improperly restricted Petitioner to bringing forward new evidence sufficient to meet the criteria of the Board's new, overly permissive policy, which Petitioner has never claimed to possess.

No good reason for this delay has been offered by the General Counsel." (App. 12a, n.5).

Nevertheless, the Fourth Circuit held that the passage of eight years and substantial employee turnover were insufficient to deny enforcement of the Board's order. (App. 12a). Furthermore, the court expressly declined to consider other equitable considerations present in this case, despite the fact that courts in other circuits have set aside NLRB bargaining orders in less egregious circumstances. (*Id.*).[4]

REASONS FOR GRANTING THE WRIT

I. This Court Should Resolve a Conflict Within the Circuits Concerning the Proper Standard for the Enforcement of Bargaining Orders Issued by the National Labor Relations Board, and Should Set Aside the Bargaining Order Here, Where the Board Has Failed to Consider Or Properly Address the Effects of Changed Circumstances Resulting From the Board's Own Unexcused Delays In Processing A Representation Case.

This case involves enforcement of a bargaining order issued by the National Labor Relations Board based on a disputed representation election which took place eight years ago. Because of the Board's erroneous failure to hold a hearing immediately following the election and its subsequent two and one-half year delay in deciding the case after a remand by the Court of Appeals, changed circumstances now exist under which enforcement of the Board's bargaining order would constitute a violation of

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[4] Among the factors not considered by the court below was the extent to which the union's electoral claim to majority status was improperly dependent upon campaign misrepresentations. Also, the court failed to consider whether the union's new affiliation, even if not sufficient in and of itself to raise a question of representation, might constitute a sufficiently unusual circumstance in combination with the other existing equitable factors, so as to justify denying enforcement of the bargaining order.

the National Labor Relations Act. Specifically, massive employee turnover and expansion of the bargaining unit, combined with changes in the labor organization seeking representation, and the tainted results of the original election, raise a new question of representation. It can no longer be said that a majority of the Petitioner's *present* employees wish to designate the present union as their exclusive bargaining representative. Thus, the Board's bargaining order ignores or violates the wishes of Petitioner's employees in violation of the Act.

As is further demonstrated below, the Court of Appeals' decision conflicts directly with decisions in at least six other circuits which have held that the Board is required to consider the effects of an unreasonable passage of time and other equitable factors on the issuance of a bargaining order. In addition, the court below reached its holding by misapplying this Court's decision in *NLRB v. Financial Institution Employees*, 475 U.S. 192 (1986), so as to preclude application of principles of equity to the enforcement of Board bargaining orders, in further conflict with other courts. Finally, the court below misapprehended the scope of the unusual changes and equitable considerations affecting the bargaining unit in the present case in reaching its erroneous result.

The effect of the Court of Appeals' decision is to ignore the Act's fundamental goal of effectuating the wishes of employees. In the guise of deterring alleged employer intransigence in litigating post-election issues, the court's holding ignores the more important objective of imposing an exclusive bargaining representative only on a workforce whose majority desires such representation. In addition, the court's decision fails to deter the Board from engaging in similar inexcusable delays in the future. It is vital that this Court act to resolve the conflict within the circuits by recognizing that, at least in such egregious and unusual circumstances as are present here, enforcement of NLRB bargaining orders may not best

effectuate the policies underlying the Act. See 29 U.S.C. § 160(c).

A. *The Decision of the Court Below Conflicts With Numerous Holdings in Other Circuits Which have Declined to Enforce Bargaining Orders in Similar or Less Compelling Circumstances.*

Courts of appeals in no fewer than six other circuits have held that the Board is required to consider the effects of an unreasonable passage of time and other equitable factors on the issuance of a bargaining order. Recognizing the Act's mandate that the wishes of the employees themselves should be of paramount concern, these courts have declined to enforce similar NLRB bargaining orders, in direct conflict with the decision below. *See Mosey Mfg. Co. v. NLRB*, 701 F.2d 610 (7th Cir. 1983); *NLRB v. Triplex Mfg. Co.*, 701 F.2d 703 (7th Cir. 1983); *NLRB v. Connecticut Foundry Co.*, 688 F.2d 871 (2d Cir. 1982); *NLRB v. Nixon Gear, Inc.*, 649 F.2d 906 (2d Cir. 1981); *Peoples Gas System, Inc. v. NLRB*, 629 F.2d 35 (D.C. Cir. 1980); *NLRB v. H.P. Hood, Inc.*, 496 F.2d 515 (1st Cir. 1974); *American Cable Systems, Inc.*, 427 F.2d 446 (5th Cir. 1970), *cert. denied*, 400 U.S. 957 (1970); *Clark's Gamble Corp. v. NLRB*, 422 F.2d 845 (6th Cir. 1970), *cert. denied*, 400 U.S. 868 (1970).[5]

In *Mosey Mfg. Co. v. NLRB*, the Court of Appeals for the Seventh Circuit declined to enforce a Board bargaining order based upon a five and one half year delay following an election won by the union. There, as here, the employer contended that the union's victory was tainted by union misrepresentations committed prior to the election. There, too, the delay was caused primarily

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[5] *See also Brooks v. NLRB*, 348 U.S. 96 (1954), where, though not presented with changed circumstances arising out of the Board's own delays, this Court affirmed that "unusual circumstances" could justify a refusal to bargain even during the so-called "certification year." *Id.* at 98-99.

by the Board's own indecision in resolving the post-election dispute. The Court observed:

> "In asking us to enforce its order the Board is appealing to our equitable powers [citation omitted]. . . . when a party asking a court to do equity has strung out the proceedings to the point where the Court cannot determine whether equitable relief would achieve the legitimate purposes of the suit, which in this case is to give a unit of [the employer's] workers the collective bargaining representative of their choice, the court will withhold its assistance. [citations omitted]. The best protection for these workers' freedom of choice would be a prompt new election, which a remand would not accomplish.

Similarly, in *NLRB v. Triplex Mfg. Co.*, 701 F.2d 703 (7th Cir. 1983), the Court of Appeals refused to enforce a Board bargaining order or to remand the case for further proceedings where "due to substantial employee turnover in this relatively small unit, there is a serious question as to whether a majority of current employees desires representation by the union." *Id.* at 709. That decision followed only a three-year delay by the Board.

Also directly on point, and in conflict with the decision below, is *NLRB v. H.P. Hood, Inc.*, 496 F.2d 515 (1st Cir. 1974). There, the First Circuit Court of Appeals found that a union had properly been certified after a lengthy post-election dispute. The court nevertheless remanded to the Board for consideration of whether the five year delay rendered bargaining inappropriate. The court held: "[W]e think fairness will be better served than by immediately locking the parties into a lengthy relationship on the basis of ancient events." *Id.* at 520. *See also St. Regis Paper Co. v. NLRB*, 674 F.2d 104 (1st Cir. 1982), where the court similarly remanded a long-delayed bargaining order for meaningful consideration of changed circumstances.[6]

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[6] Following the First Circuit's remand in *St. Regis Paper Co.*, the Board agreed that the changes in the unit had been substantial

Two oft-cited cases in the Second Circuit have also denied enforcement of Board bargaining orders under similar circumstnaces. *NLRB v. Connecticut Foundry Co.*, 688 F.2d 871, 881 (2d Cir. 1982); and *NLRB v. Nixon Gear Inc.*, 649 F.2d 906, 914 (2d Cir. 1981). In both of those decisions, the Second Circuit held that it must "grant the relief that furthers the equitable principles which govern judicial action". *NLRB v. Connecticut Foundry Co.*, 688 F.2d at 881. Accordingly, the court in both instances denied enforcement of NLRB bargaining orders after disputed union electoral victories which the Board had failed to resolve in an appropriate length of time (4 years and 2 years respectively).

Another decision in conflict with the holding of the court below is *Peoples Gas System, Inc. v. NLRB*, 629 F.2d 35 (D.C. Cir. 1980). There, the Court of Appeals for the District of Columbia Circuit held that an employer who unlawfully withdrew recognition from a certified union should not be compelled to bargain with the union after a five and one-half year delay caused by the Board. The Court of Appeals held:

> [B]argaining orders do not automatically flow from a refusal to bargain if it is not clear that the employees desire the union as their representative. A balance must be drawn in such cases between the various purposes of the Act. For example, if the employer's violation is deliberate and egregious enough, the interest in deterrence of future violation may override the employees' wishes, especially if it is likely that the workers' rejection of the Union flows from the company's violations.
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> When the violation is less substantial and was committed in good faith the interest in deterrence is less substantial as well. Correspondingly, the employees'

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enough to render a bargaining order inappropriate, even though all of the changes occurred after the union's certification of majority status. 285 NLRB No. 39 (1987).

> rights to decide whether they want Union representation, and by which Union, should be given greater weight. The Board should make findings as to the likelihood of infringement of those rights and explain, if it should conclude that a bargaining order is nevertheless necessary, why other remedies would not suffice and why other purposes of the Act must outweigh the employees' rights.

629 F.2d at 47.

Finally, several court decisions have declined to enforce NLRB bargaining orders even where the employer has committed egregious unfair labor practices not present here. Thus, in *Clark's Gamble Corp. v. NLRB*, 422 F.2d at 847, the Sixth Circuit set aside a bargaining order after a two-year delay caused by the Board in ruling upon unfair labor practices committed by the employer. The court stressed the importance of determining and implementing employee choice in the selection of an exclusive bargaining agent and concluded that it would be contrary to the intentions of the Act to enforce a Board order which did not take into account evidence of high employee turnover. *See also, NLRB v. Ship Shape Maintenance Co., Inc.*, 474 F.2d 434 (D.C. Cir. 1972), where the Court held:

> Where a remedial order has the primary effect of negating the rights of current employees rather than furthering them, it defeats, rather than effectuates, the policies of the NLRA. In the instant case, the enforcement of the Labor Board's proposed bargaining order would impose representation upon a current unit of employees, the vast majority of whom were neither employed by the Company at the time of its unfair labor practice violation nor meaningfully affected by its commission. Such enforcement would ignore the fact that the NLRA expressly protects the right of employees to *refrain from* organizational activity if they so desire.

As contrasted with these cases in which the courts have set aside NLRB bargaining orders, some court decisions have reached contradictory results. But *no* court of appeals has enforced an NLRB bargaining order involving the combination of equitable factors existing in the present case. Those factors include eight years of delay, substantial employee turnover, substantial expansion of the bargaining unit itself, fundamental change in the union seeking representation, a close election in which union misrepresentations may have determined the outcome, the failure of the Board to conduct a statutorily required hearing, and subsequent delay in the Board's decision of the case. Thus, in *Bridgeport Fittings, Inc. v. NLRB*, 877 F.2d 180 (2d Cir. 1989), the court declined to set aside a bargaining order where there had only been three and one-half years of delay and 50% employee turnover, and no other equitable factors were present. *See also NLRB v. Western Temporary Services*, 821 F.2d 1258 (7th Cir. 1987) (delay of only one-and-one half years).

In *NLRB v. Star Color Plate Service*, 843 F.2d at 1507 (2d Cir.), *cert. denied*, 109 S. Ct. 81 (1988), the Second Circuit acknowledged that its enforcement of the Board's bargaining order "may impose a bargaining representative that is not wanted by a majority of employees and . . . this result is contrary to the policies of the Act." Even so, contrary to the Court of Appeals below, the Second Circuit at least required the Board to give actual notice to the current employees of their statutory right to petition for a decertification electon. *Id.* at 150. While this attempt at mitigation is wholly inadequate to remedy the deficiencies of the Board's bargaining order,[7] the fail-

[7] Informing employees of their right to petition for a decertification election provides little consolation to those employees when they realize that they are precluded from filing any such petition for a period of one year after the employer begins bargaining with the union. *See Peoples Gas System, Inc. v. NLRB*, 629 F.2d at 45, n.17. During that one year period, the parties may reach an agreement which applies to all covered employees, which could bar a

ure of the court below to provide even this much relief directly conflicts with the holding of the Second Circuit.[8]

B. *The Court Below has Misapplied the Holding of this Court in* NLRB v. Financial Institution Employees *and has Erroneously Failed to Considered Principles of Equity in Enforcing the Board's Order.*

No other court of appeals has held that enforcement of a Board bargaining order in the face of unusual, changed circumstances caused by NLRB delay is in any way controlled by this Court's decision in *NLRB v. Financial Institution Employees*, 475 U.S. 192 (1986). Most of the circuits, regardless of the outcome of their particular cases, have held that challenges to NLRB bargaining orders should be analyzed under principles of equity, in order to determine whether "unusual circumstances" exist such as those allowed for in *Brooks v. NLRB*, *supra*. *See Mosey Mfg. Corp. v. NLRB*, 701 F.2d at 617; *see also NLRB v. Pace Oldsmobile*, 739 F.2d 108, 112 (2d Cir. 1984); *NLRB v. Marion Rohr Corp.*, 714 F.2d 228, 232 (2d Cir. 1983); *NLRB v. Connecticut Foundry Co.*, 688 F.2d at 881; *NLRB v. Triplex Mfg. Co.*, 701 F.2d at 709.

In the present case, however, the Court of Appeals erroneously relied on certain dictum from this Court's

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decertification election for an additional three years. *Id.* Alternatively, the employer and the union could reach an impasse in collective bargaining, resulting in a costly and disruptive strike, and subjecting the employees to numerous pressures should they be asked to cross union picket lines.

[8] Nor does the lower court's decision here draw any support from this Court's holding in *NLRB v. Katz*, 369 U.S. 736 (1962). In that case, the Court held only that the mere existence of some delay, *without any other unusual circumstances*, did not justify setting aside a Board bargaining order in that particular case. The Court was not presented with, and has never ruled on, the effects of the types of equitable factors present in the instant case.

opinion in *Financial Institution Employees*, taking the language out of its proper context in order to establish a new standard for review of unlawfully delayed Board bargaining orders. According to the Court of Appeals, this Court's passing reference to the requirements of "objective considerations" supporting "loss of majority status" somehow precludes appellate courts from considering unusual changed circumstances arising out of multi-year Board delays. This view is clearly wrong and directly conflicting with other circuits. Therefore, review by this Court is necessary, in order to prevent an erroneous and conflicting standard of review from being enforced.

NLRB v. Financial Institution Employees solely concerned the question of whether the failure of a union to allow non-member employees to vote on a proposed reaffiliation raised a sufficient question of representation to justify withdrawal of recognition of the previously certified or recognized union. None of the factors present here, such as turnover, Board-sponsored delay, campaign misrepresentations or otherwise disputed elections, were considered by the Court or were otherwise at issue in the *Financial Institution Employees* case. Therefore, no basis existed for the court below to interpret that decision as somehow precluding the courts of appeals from exercising their equitable powers in connection with the enforcement of Board bargaining orders generally. In this connection, the Court of Appeals' decision squarely conflicts with each of the decisions cited above from the different circuits, in that the other courts of appeals have traditionally considered equitable factors in ruling upon Board orders.[9]

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[9] *See also Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939) ("The jurisdiction to review rulings of the Labor Relations Board is vested in a court with equity powers, and while the Court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action.").

It should be noted that, even if the *Financial Institution Employees* standard adopted by the court below were the correct one, the Court of Appeals decision would still present a clear conflict among the circuits in need of resolution by this Court. This is because the court below erroneously failed to find that the combined factors of turnover, delay, change of union affiliation, and disputed election, constituted "objective considerations that provide some reasonable for grounds for believing that the union has lost its majority status," within the meaning of *Financial Institution Employees. Id.* at 198.[10] In other words, the present facts clearly meet the standard for review set forth in this Court's opinion to the extent that the opinion establishes a new standard, which Petitioner reiterates is not the case. In any event, the Court of Appeals decision must be reversed because it purports to remove equitable considerations of unusual changed circumstances entirely from judicial consideration of NLRB bargaining orders, which conflicts with the standard applicable in other circuits.

C. *This Case Raises an Important and Continuing Issue in a Posture Which is Ripe for Resolution by This Court.*

As has already been shown, the issue of the effects of Board-sponsored delay upon NLRB bargaining orders is a recurring one which has divided the circuits over an extended period of time. Absent review and reversal by this Court, together with announcement of a clear standard for review, the policy favoring employee free choice will be frustrated and the Board will have no incentive to avoid those unnecessary delays which result in bar-

[10] The court below erroneously attempted to characterize this case as involving the issue of employee turnover "without more." (App. 12a). The court thereby failed to consider in combination the additional factors relating to the dramatic expansion in the size of the unit itself, the disputed nature of and misrepresentations connected with the close election, and the union's change in affiliation.

gaining representatives being imposed upon employees who no longer have any interest in such representation. The competing policy considerations involved in deciding this issue are uniquely suited to resolution by this Court.

Moreover, the facts of this case are better suited than most such cases for certiorari review. The employer here has committed no unfair labor practices other than the initial refusal to bargain, which has been held to be a prerequisite to obtaining judicial review.[11] The length of time which has passed since the election on which the bargaining order was based is substantial (eight years). Indeed, this delay is greater than the vast majority of the cases in which Board bargaining orders have been challenged.[12] The delay is principally the responsibility of the Board, which first failed to conduct a statutorily required hearing, and then failed to issue its decision on remand for two-and-one-half years.

The Union also lacks "clean hands" in the matter, having failed to inform either the Board or the Employer of its reaffiliation in a timely manner. The Petitioner also contends that the Union committed campaign misrepresentations in order to achieve its disputed electoral victory, a contention which the court below avoided by erroneously allowing the Board to apply new policies retroactively to this case.

Finally, the amount of turnover which has occurred here has been substantial. Over 73% of the current work force has become employed since the time of the election. Moreover, the expansion in the size of the unit has been

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[11] *See Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146 (1941); *American Federation of Labor v. NLRB*, 308 U.S. 401 (1940).

[12] Petitioner is aware of only one similar case in which a longer period transpired from the refusal to recognize a union to the court decision on enforcement of a subsequent bargaining order. *NLRB v. Koenig Iron Works*, 856 F.2d 1 (2d Cir. 1988). In that case, following a twelve year delay, the court of appeals denied enforcement of the Board's bargaining order.

equally dramatic, growing by over 200%. Thus, no better vehicle could be presented for this Court to resolve the important issues presented herein.

CONCLUSION

For the reasons set forth above, and upon the entire record herein, Petitioner respectfully asks this Court to issue a writ of certiorari to review the judgment and opinions of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

MAURICE BASKIN *
VENABLE, BAETJER, HOWARD
& CIVILETTI
1301 Pennsylvania Avenue, N.W.
Suite 1200
Washington, D.C. 20004
(202) 662-4300
Attorneys for Petitioner

Date: December 11, 1989

* Counsel of Record

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2602

NATIONAL POSTERS, INC.; NATIONAL LITHO,
A DIVISION OF NATIONAL POSTERS, INC.,
Petitioners,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent,

BALTIMORE GRAPHIC COMMUNICATIONS UNION,
LOCAL NO. 61-C
Intervenor.

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board
(Board Case No. 5-CA-14585)

Argued: April 11, 1989 Decided: September 13, 1989

Before ERVIN, Chief Judge, and PHILLIPS and SPROUSE, Circuit Judges.

Maurice Baskin (Rosemarie Schmidt, VENABLE, BAETJER, HOWARD & CIVILETTI on brief) for Petitioner. Marsha S. Berzon (Jeffrey B. Demain, ALTSHULER & BERZON; Laurence Gold; Sandra Hughes, O'DONNELL, SCHWARTZ, & ANDERSON on brief) for Intervenors. Joseph Henry Bornong (Rosemary M. Collyer, General Counsel; Robert E. Allen, Associate General Counsel; Aileen A. Armstrong, Deputy Associate General Counsel; Paul J. Speilberg, Deputy Assistant General Counsel on brief) for Respondent.

Ervin, Chief Judge:

National Posters Inc. ("NPI"), petitions for review of a bargaining order issued by the National Labor Relations Board ("NLRB"). NPI presses several arguments in support of a claim that it should not be required to recognize the Baltimore Graphic Communications Union, Local 61-C ("Local 61-C") as the collective bargaining agent for its employees. Finding no merit in any of these arguments, we grant enforcement of the NLRB's order.

I.

NPI is a commercial poster printer that employed over fifty people at two Baltimore plants during 1981. During that year, the predecessor to the Local 61-C, the Baltimore Printing Pressmen and Assistants Union, Local 61 ("Local 61"), conducted a bitter organizing campaign. On December 15, 1981, a representation election was held for the stipulated bargaining unit which included NPI's production and maintenance workers. The initial vote tally revealed 24 votes in favor of Local 61 and 21 votes opposed, with three ballots challenged by Local 61 and one ballot challenged by NPI. Without holding a hearing, the NLRB's Regional Director rejected NPI's challenge to the ballot cast by Samuel John. John's ballot was sub-

sequently opened and counted. Since it was cast in favor of the union, his ballot gave the union a decisive 25 to 21 majority and the three remaining ballot challenges became moot. Local 61 was thereafter certified and on December 10, 1982, the NLRB issued an order requiring NPI to bargain collectively with Local 61.

This is the second time the parties' disputes over the results of that election have been before us. In *National Posters Inc. v. N.L.R.B.*, 720 F.2d 1358 (4th Cir. 1983) (*"National Posters I"*), we vacated the NLRB's December 10th bargaining order because the NLRB's Regional Director rejected NPI's challenge to John's ballot without affording NPI the opportunity for a hearing on the underlying factual issues.[1] On remand, Administrative Law Judge Bernard Ries conducted a hearing on NPI's and Local 61's ballot changes. After hearing three days of testimony in June of 1984, Ries issued a lengthy opinion in which he found that John was eligible to vote. He also found that among the ballots challenged by Local 61, Wesley Souders was eligible to vote and Albert Amend was not. After an unexplained two year delay, the NLRB adopted ALJ Ries' decision. On NPI's motion, though, the NLRB reopened the hearings in light of the intervening merger of the International Printing and Graphic Communications Union (Local 61's former national affiliate) with the Graphic Arts International Union. As a result of this merger, Local 61 adopted its current name as the Baltimore Graphic Communications Union, Local 61-C. NPI charged that this merger substantially changed the local union and therefore raised a question concerning the local union's continued majority status among bargaining unit employees.

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[1] For reasons not pertinent here, we also instructed the NLRB to allow NPI to amend its allegations of election campaign misrepresentations by Local 61. *National Posters I*, 720 F.2d. at 1364. NPI subsequently abandoned these allegations and the issue is no longer before us.

ALJ Ries conducted a second hearing in July of 1987. In an opinion issued in February of 1988, he concluded that the merger did not so substantially change the local union as to require its decertification as the bargaining representative for NPI's employees. On June 30, 1988, the NLRB adopted ALJ Ries' findings and declined NPI's invitation to reopen the case yet again to consider whether turnover among employees in the bargaining unit during the seven years since the election required a new election. Continuing its all out efforts to avoid the bargaining table, NPI now petitions for review of each and every decision by the NLRB recounted above.

II.

We turn first to NPI's claim that the NLRB erroneously found that John was eligible to vote in the representation election. John worked at NPI off and on for roughly six months prior to the representation election as an on-call "racker" in the silk screen department. Unlike NPI's regular "rackers", John was only paid the minimum wage and received no fringe benefits. His time cards show that some weeks he worked over forty hours while during other weeks he did not work at all.[2] For purposes of determining voter eligibility, the NLRB distinguishes between part-time employees and seasonal or casual workers. Seasonal workers are generally not eligible members of the relevant bargaining unit, while part-time employees may be included in the bargaining unit if they share a sufficient "community of interests" with full time employees. Where part-time employees are included in the bargaining unit, such employees are eligible to vote if they average four hours of work per week in the quarter preceding the election. *V.I.P. Movers, Inc.*, 232 NLRB 14, 97 LRRM 1498 (1977). Applying this

[2] John's weekly hours from the date of his hiring up until two weeks after the election are reproduced in our prior opinion in *National Posters v. N.L.R.B.*, 720 F.2d, at 1359, n.1.

objective hours per week test, ALJ Ries found that John was an eligible part-time employee.

NPI does not contest the propriety of including part-time workers in the bargaining unit. Instead, it contends that John was a casual or seasonal employee hired solely to work for the 1981 Christmas peak season. According to NPI, John was not a part-time worker and therefore the objective hours test was erroneously applied. Further, NPI argues that this conclusion is compelled by the law of the case. In our previous decision, we noted that NPI had made out a prima facie case that John was a seasonal employee by alleging:

> (1) [NPI] experienced a Christmas peak season; (2) [NPI] maintains a pool of peak season employees; (3) John was hired to work only on a peak season basis; (4) John was paid less than and received none of the benefits available to full-time employees and had no assurance of recall; and (5) John, in fact, worked primarily during the Christmas peak season and stopped work thereafter.

National Posters I, 720 F.2d, at 1363. NPI now claims that evidence produced at the June 1984 hearing before ALJ Ries proved each of these allegations and thus, according to the law of the case, the ALJ was required to find that John was ineligible.

This argument is unpersuasive for two reasons. First, as discussed more fully below, ALJ Ries did not find that NPI had proved all of its allegations. Second, by expressly noting NPI's allegations, we in no way intended to alter the legal standard for determining whether John was a seasonal or part-time employee. Instead, we merely noted NPI's allegations were sufficient to raise a prima facie case and entitle NPI to a hearing. We explicitly stated that "other facts might tend to support the Regional Director's conclusion [that John was a part-time employee and], whether that conclusion is supported by

substantial evidence is a question apart from whether [NPI] was entitled to a hearing on the underlying factual issue." *National Posters I*, 720 F.2d, at 1363. Thus, even if NPI had proved each of its allegations, ALJ Ries' was not bound by the law of the case to conclude that John was a seasonal worker so long as other evidence supported a contrary conclusion. The "law of the case" here is of no particular assistance to NPI's cause for it merely requires us to review the NLRB's decision according to the general principles of labor law.

Distinguishing between seasonal and part-time employees is no easy task. *See N.L.R.B. v. Western Temporary Services*, 821 F.2d 1258 (7th Cir. 1987). Addressing issues regarding the eligibility of non-permanent individual employees, courts have commonly looked to the language defining the bargaining unit and where that language was ambiguous, allowed the NLRB to resolve the issues according to the "community of interests" standard. *See, e.g., N.L.R.B. v. Boston Beef*, 652 F.2d 223 (1st Cir. 1981); and *N.L.R.B. v. Speedway Petroleum*, 768 F.2d 151 (7th Cir. 1985). *See also I.T.O. Corp of Baltimore v. N.L.R.B.*, 818 F.2d 1108, 1112-13 (4th Cir. 1987) (discussing "community of interests" standard generally). Applying this standard, "[t]he Fourth Circuit has upheld [NLRB] decisions which permitted unemployed seasonal employees to vote where they 'had at the time of the election a reasonable expectation of reemployment within a reasonable time in the future.'" *N.L.R.B. v. Atkinson Dredging*, 329 F.2d 158, 162 (4th Cir. 1964), *quoting N.L.R.B. v. Jesse Jones Sausage Co.*, 309 F.2d 664, 665 (4th Cir. 1962). The NLRB's policy is that on-call employees share the requisite "community of interests" if their work history satisfies the objective hours test. *See V.I.P. Movers*, 232 NLRB 14, 97 LRRM 1498 (1977).

The ALJ's determination of John's employment status at NPI is a conclusion of law. *National Posters I*, 720

F.2d, at 1362-63. The correctness of that conclusion turns, however, upon factual findings regarding NPI's intention in hiring John. *See Id.* As suggested in *National Posters I*, if NPI hired John "based on the periodic availability of work rather than on peak season demand," John was eligible to vote. *Id.*, at 1363. NLRB determinations of fact are to be upheld if supported by substantial evidence on the record as a whole, "even though we might have decided the case differently de novo." *ARA Leisure Services, Inc. v. N.L.R.B.*, 782 F.2d 456, 462 (4th Cir. 1986). *See also N.L.R.B. v. Atkinson Dredging Co.*, 329 F.2d, at 162.

ALJ Ries' decision that John was hired with a reasonable probability of working on more than a one-time seasonal basis is supported by substantial evidence. NPI's Treasurer, Diane Hild, testified that the company maintained a pool of on-call individuals who were routinely called in to work as temporary replacements for sick or vacationing workers in addition to helping fulfill peak season labor needs. She also stated that NPI preferred to rehire responsible people from its "call list" and that "call list" employees were sometimes hired to fill full-time positions. John was on this list for the six months preceding the election. The record reveals that John was hired to perform several different jobs prior to the election and the NPI appeared to be satisfied with his work. Hild testified that John was retained on the "call list" after the Christmas, 1981, season. She could not explain, however, why his name was removed from the list shortly after the election. This evidence provides substantial support for the ALJ's finding that John had a reasonable expectation of continued, albeit sporadic, employment and that he was therefore eligible to vote. Accordingly, we uphold the NLRB's decision to count John's ballot and to certify Local 61.[3]

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[3] NPI also challenges the ALJ's decision that Albert Amend was a supervisor and therefore ineligible to vote. Having affirmed the ALJ's decision regarding John, it is unnecessary for us to review

III.

Changes in circumstances may erode employee support for a certified bargaining agent. For this reason, the NLRA allows both employees and employers to petition the NLRB to conduct new representation elections. *N.L.R.B. v. Financial Institution Employees*, 475 U.S. 192, 198 (1986), 29 U.S.C. § 159(c)(1)(A)(ii) (petition by employees), and 29 U.S.C. § 159(c)(1)(B) (petition by employer). The NLRB may then direct a new election if, after investigation, it finds that a question of representation exists. 29 U.S.C. § 159(c). In order to raise a question of representation, "[t]he employer, however, must 'demonstrate by objective considerations that it has some reasonable grounds for believing that the union has lost its majority status.'" *Financial Institution Employees*, 475 U.S., at 198, *quoting United States Gypsum Company*, 157 NLRB 652, 656 (1966). A union reorganization, such as a merger or a change in affiliation, may erode rank and file support, especially if the reorganization "substantially change[s] a certified union's relationship with the employees it represents." *Id.*, at 202. In most instances, however, organizational adjustments are generally internal union affairs with which neither courts nor the NLRB should lightly interfere.

NPI claims that the July, 1983, merger of the International Printing and Graphic Communications Union ("IPGCU") with the Graphic Arts International Union ("GAIU") to form the Graphic Communications International Union (the "GCIU") raises a question of representation. As noted above, this reorganization merged Local 61's former national affiliate into a newly created

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Amend's eligibility. Once counted, John's ballot brings the vote tally to 25 in favor and 21 opposed to unionization. The three remaining challenged ballots can not alter the outcome of the election and we see no purpose in reviewing the merits of those challenges.

national affiliate, the GCIU. NPI argues that this merger brought about such drastic changes that the substantial continuity of Local 61 with the current Local 61-C is in doubt.

In determining whether reorganizations "substantially change a certified union's relationship with the employees it represents," courts and the NLRB typically consider the effect on a local union's structure, administration, officers, assets, craft jurisdiction, autonomy, by-laws, and the rights and obligations of the union's membership and leadership. *See N.L.R.B. v. Pearl Bookbinding*, 517 F.2d 1108, 1111-12 (1st Cir. 1975); *J. Ray McDermott & Co. v. N.L.R.B.*, 571 F.2d 850, 857 (5th Cir. 1978); and *N.L.R.B. v. Insulfab Plastics*, 789 F.2d 961, 966 (1st Cir. 1986). Whether corporate-style reorganizations of unions and their affiliates so substantially change a union that a new representation election is required depends on factual determinations of the effects of reorganization. *See N.L.R.B. v. Insulfab Plastics*, 789 F.2d, at 966. And, of course, the NLRB's determinations of the effects of such reorganizations must be upheld if supported by substantial evidence.

NPI strenuously argues that several differences between the structure, officers, and craft jurisdiction of the IPGCU and the new GCIU have transformed Local 61. Specifically, NPI points to the fact that GCIU's charter expands the union's craft jurisdiction beyond the printing industry, and most of the new union's national officers are former officers of GAIU rather than IPGCU.[4] The

[4] NPI also challenges the ALJ's refusal to grant a delay in the hearings so that NPI could subpoena GCIU Vice-President James J. Mitchell. Mitchell was formerly an IPGCU officer. We find no harm in the fact that NPI was unable to present Mitchell's proffered testimony regarding the existence of a conspiracy on the part of former GAIU officers to dominate the new GCIU to the exclusion of former IPGCU officers, and to ignore provisions of the merger agreement. We see little relevance in this proffered testi-

ALJ, however, discounted the effect of these and other changes at the national affiliate level and instead focused his inquiry on changes at the local level and alleged changes in Local 61's autonomy. This decision was entirely appropriate on the facts of this case. Local 61 was the former representative for NPI's unit employees and differences between Local 61 and Local 61-C clearly have the most dramatic effect on the relationship between unit employees and their representative. While changes in the governing structure of a local union's national affiliate could alter the identity of the local, especially if the local's bargaining autonomy is consequently restricted, it is the substantial continuity of the local union rather than the affiliate that remains at issue. *See Financial Institution Employees*, 475 U.S., at 207.

Turning, then, to the asserted differences between Local 61 and Local 61-C, we find that the record strongly supports the ALJ's conclusion that these differences were minor or illusory. In several important areas, the merger brought no changes. All of Local 61's officers except one vice-president retained their offices in Local 61-C. Local strike action had to be approved by the national both before and after the merger. And per capita dues to the affiliate remained unchanged by the merger. After the merger, Local 61-C did relocate its offices and did raise local dues, but this dues increase was proportional to pre-merger dues increases. These changes were, at best, only tangentially related to the merger. Other changes noted by NPI hardly call rank and file support into question. At GCIU's instruction, Local 61-C obtained new legal counsel and, as a result of the merger, local assets and revenues rose moderately.

On these facts, we can hardly say that NPI has "demonstrated by objective considerations" that Local 61-C

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mony to the issue of substantial continuity between Local 61 and Local 61-C.

has lost majority support. Thus the ALJ's decision that NPI has not raised a question of representation must be upheld.

IV.

Finally we turn to NPI's assertion that it was entitled to have the hearings reopened so that it could present evidence that employee turnover since the 1981 election required a new election. NPI points out that its work force has grown to over 130 employees and that 18 of the original 55 workers have left the company since the election. NPI suggests that under precedent established in *St. Regis Paper Co.*, 285 NLRB No. 39, 126 LRRM 1017 (1987), the NLRB was required to consider whether employee turnover and the inordinate delay since the election constitute changed circumstances which warrant a withdrawal of the bargaining order. NPI also urges that the eight year delay was solely the NLRB's fault and that we should therefore deny enforcement rather than remanding the case for further hearings.

Courts have, albeit rarely and in extreme cases, declined to enforce bargaining orders because of undue delay, attributable to the NLRB, in the resolution of election disputes. *See Mosey Mfg. Co. v. N.L.R.B.*, 701 F.2d 610 (7th Cir. 1983). And in some cases, courts have noted that employee turnover during such delays may call into question the continuing validity of close election results. *See N.L.R.B. v. Katz*, 701 F.2d 703 (7th Cir. 1983); *N.L.R.B. v. Nixon Gear, Inc.*, 649 F.2d 906 (2nd Cir. 1981); *N.L.R.B. v. Connecticut Foundry Co.*, 688 F.2d 871 (2nd Cir. 1981); *N.L.R.B. v. Connecticut Foundry Co.*, 688 F.2d 871 (2nd Cir. 1982). In most of these decisions, the refusal to enforce bargaining orders was justified on traditional principles of equity. *See, e.g., Mosey Mfg. Co.*, 701 F.2d at 613 ("When a party asking a court to do equity has strung out the proceeding to the point where the court cannot determine whether equitable relief would achieve the legitimate pur-

poses of the suit . . . the court will withhold its assistance."). On this authority, NPI argues that employee turnover and NLRB delays in deciding this case justify denying enforcement of the NLRB's bargaining order.

Unlike the delays in the cases relied upon by NPI, we hesitate to lay the entire blame for the eight year delay in the proceedings below on the NLRB.[5] Without attempting to further distinguish the decisions of our sister circuits, though, we hold that NPI's challenge must be analyzed under the principles set forth in *Financial Institution Employees, supra,* rather than the principles of equity. In other words, employee turnover, just like a union reorganization, is a change in circumstance of no particular consequence unless it raises a question of representation. And again, to raise a question of representation, NPI must "demonstrate by objective considerations that it has some reasonable grounds for believing that the union has lost its majority status." *Financial Institution Employees,* 475 U.S., at 198.

NPI's only evidence, however, is the bare fact that employee turnover has occurred during the eight years since the election. This, without more, is insufficient to raise a question of representation. *Cf. Universal Security Instruments Inc., v. N.L.R.B.,* 649 F.2d 247, 255 (4th Cir., 1981) ("Replacement employees are presumed to support the unit in the same ratio as those replaced."), and *N.L.R.B. v. 1199, National Union of Hospital and Health Care Employees,* 824 F.2d 318, 323 (4th Cir. 1987) ("Where a union is certified after a representation election, the employer cannot challenge majority status until it has bargained with the union for a reasonable period, usually one year."). Indeed, the record is entirely devoid of evidence that new employees are dis-

[5] We do note, however, that the NLRB's disposition of this case has been no model of administrative efficiency. Almost two and a half years elapsed after the first hearings on John's voting eligibility and the NLRB's decision. No good reason for this delay has been offered by the General Counsel.

satisfied with or otherwise opposed to Local 61-C's representation. Were we to adopt NPI's argument that it was entitled to a hearing on this evidence, we would effectively hold that the passage of time and employee turnover are sufficient to raise doubts about rank and file support. This we will not hold. Since NPI failed to present sufficient evidence to raise a question of representation, the NLRB properly declined to hold hearings on the issue of employee turnover.

V.

We conclude that the record supports the NLRB's determinations that John was eligibile to vote in the 1981 election and that the intervening merger of Local 61-C's former affiliate did not call into question Local 51-C's rank and file support. We also conclude that NPI's bare assertions of employee turnover did not necessitate further hearings and further delays in these already unduly protracted proceedings. The NLRB's order directing National Posters, Inc., to bargain with the Baltimore Graphic Communications Union, Local 61-C is hereby

ENFORCED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-2140

NATIONAL POSTERS, INC. and NATIONAL LITHO a division of National Posters, Inc.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for Review and Cross-Application for Enforcement of
an Order of the National Labor Relations Board

Argued: July 12, 1983 Decided: November 3, 1983

Before PHILLIPS, SPOUSE and ERVIN, Circuit Judges.

Maurice Baskin (Venable, Baetjer, Howard & Civiletti on brief) for Petitioner; Daniel R. Pollitt, National Labor Relations Board (William A. Lubbers, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Associate General Counsel, Elliott Moore,

Deputy Associate General Counsel, Jolane A. Findley on brief) for Respondent.

ERVIN, Circuit Judge:

This is a petition by National Posters, Inc. ("Employer") for review of an order by the National Labor Relations Board ("Board"). That order, issued December 10, 1982, requires Employer to bargain collectively with the Baltimore Printing Pressmen and Assistants Union ("Union"). Employer had refused to bargain with the Union in order to obtain judicial review of the Board's certification of the Union as the bargaining representative of all production and maintenance employees at Employer's two Baltimore plants. Because we conclude that the Board improperly certified the Union, we vacate the order and remand to the Board for further proceedings.

I.

Employer is a commercial poster printer. It employs over 50 people at its two Baltimore plants. Earl Seth, Jr., is president and owner of Employer. In the fall of 1981, the Union conducted an organizing campaign among Employer's employees. A central issue in the campaign was the level of wages and benefits, which had been cut back as a result of Employer's financial problems. The campaign culminated in a representation election which was held on December 15, 1981. The initial election tally was 24 for the Union and 21 against, with 4 challenged ballots, three by the Union and 1 by Employer.

Employer challenged the vote of employee Samuel John. The challenge was supported by an affidavit submitted by Seth, who indicated that he intended John to be employed only on a peak seasonal basis. John was hired in June, 1981 as a seasonal employees who is "on call"

to perform the job of "racking." [1] When John worked, he did so "shoulder-to-shoulder" with Employer's two full-time rackers. John was paid the minimum wage, $3.35 per hour, while the two full-time rackers earned $3.47 and $4.37 per hour respectively. Unlike John, their salaries would increase with their length of service. John also did not receive any of the benefits enjoyed by full-time employees such as health and welfare insurance, vacation pay, sick pay, or holiday pay.

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[1] From the date of his hiring through the end of 1981, John worked the following number of hours during the weekly pay periods.

Week ending 1981	Hours Worked
6/30	9
7/3	0
7/10	0
7/17	0
7/24	36
7/31	8
8/7	0
8/14	0
8/21	0
8/28	22½
9/4	0
9/11	0
9/18	0
9/25	30½
10/2	43¾
10/9	0
10/16	0
10/23	27
10/30	36
11/6	45
11/13	51¼
11/20	47¾
11/27	28¾
12/4	8½
12/11	35¾
12/18	50
12/25	26¼
1/2/82	16

Employer's business experienced a seasonal surge of business during the Christmas rush season. Employer maintained a pool of seasonal employees who could work during that period of increased demand. Seasonal employees, including John, were free to work elsewhere when not working for Employer. These employees had no assurance of recall.

Employer maintains that John's hours during late September through December reflect the Christmas rush and that John did not work after the payroll period ending January 2, 1982, because the Christmas rush period ended.

Employer also objected to the election on grounds that the Union had engaged in campaign misconduct by making five material misrepresentations that affected the election results. In its Objection 1, Employer alleged that in the week prior to the election, Union President Gerald Brown, as well as other Union representatives, falsely told numerous employees that Employer had spent large sums of money on gifts for his children, including the purchase of a large farm for his daughter. In its Objection 2, Employer alleged that the Union had materially misrepresented the Union's pension plan by stating or implying that employees automatically would be entitled to participate in the Union's plan upon selecting the Union, and that employees' participation in the plan automatically would be paid for out of union dues. In its Objection 3, Employer alleged that the Union materially misrepresented the health and welfare benefits to which the employees would be entitled if the Union were selected by stating or implying that all of the Union's contracts contained all health and welfare benefits being promised by the Union and leading the employees to believe that they automatically would be entitled to optical coverage and other benefits upon mere payment of dues following the Union's certification. In its Objection 4, Employer alleged that Union representa-

tives misrepresented to numerous employees the amount of dues employees would be required to pay to join the Union. Lastly, in its Objection 5, Employer generally alleged that "various other false and misleading statements" were made by Union representatives. These exceptions were supported by the affidavits of Seth and three supervisors.

On March 16, 1982, the Board's Regional Director issued, without a hearing, a report recommending that Employer's challenges be overruled. The Regional Director found that John was an eligible voter, rejecting Employer's claim that John was a seasonal employee. Instead, the Regional Director characterized John as a part-time employee, finding that "Employer's need for John's services is more dependent upon the availability of jobs requiring extra racking, than upon particular peak periods of the business year." The Regional Director considered the ruling supported by (1) John working in each of the six months prior to the December election, (2) John performing, when he did work, the same tasks as full-time workers and working shoulder-to-shoulder with those workers and (3) John being supervised by the supervisor of the full-time employees. The Regional Director then applied the Board's objective number of hours test for determining if part-time employees are eligible voters: part-time employees are eligible voters if they average four hours of work per week in the quarter preceeding the election. *See V.I.P. Movers, Inc.*, 232 NLRB 14 (1977); *Davison-Paxon Co.*, 185 NLRB 21 (1970). Since John averaged more than four hours per week, he was found to be eligible.

The Regional Director also overruled one of the Union's voter challenges and after counting the two challenged ballots, the new tally became 25-22 in favor of the Union. Thus, the two remaining challenged votes could not affect the election, assuming the challenges to the other two votes were properly overruled.

The Regional Director rejected all of the objections concerning Union misrepresentations. The Regional Director found that even if the allegations in Objection 1 were true, the misrepresentations did not accuse Seth of corporate malfeasance and, thus, under the standard set out in *Hollywood Ceramics/General Knit* did not affect election results. *See General Knit of California, Inc.*, 239 NLRB 619 (1978); *Hollywood Ceramics Co.*, 140 NLRB 221 (1952). Objections 2 through 5 were overruled because they were supported by only the hearsay affidavits of three supervisors, and not by the statements of witnesses to the alleged misrepresentations.

Employer filed timely objections to the Regional Director's decision, but on June 29, 1982, the Board affirmed that decision. The Board did so without a hearing and without review of the affidavits submitted by Employer to the Regional Director in support of its challenges. The Regional Director did not transmit the affidavits to the Board as part of the record. In its opinion, the Board did not specifically address Employer's challenge to John's eligibility or the alleged misrepresentation in Objection 1. With respect to Objections 2-5, the Board affirmed the Regional Director on the grounds that the alleged misrepresentations did not violate *Hollywood Ceramics/General Knit* standards:

> Assuming the veracity of the Employer's claims regarding Employer's Objections 2-5, we find that the Employer failed to establish a *prima facie* case that the Petitioner made representations which would warrant setting aside the results of the election.

On July 14, 1982, the Regional Director certified the Union. Employer refused to bargain with the Union, and on December 10, 1982, the Board issued a cease and desist order requiring Employer to bargain collectively with the Union. Employer then petitioned this court for review of the Board's order.

II.

Employer first claims that under *NLRB v. Cambridge Wire Cloth Co., Inc.*, 622 F.2d 1195 (4th Cir. 1980), this case should be remanded to the Board with direction to the Regional Director to transmit all material included in his decision, including the various affidavits submitted by Employer, to the Board for its consideration. *Cambridge Wire* involved facts identical in material respects with those here. In that case, as here, the employer contended for the first time on appeal to this court that the Regional Director failed to transmit to the Board certain affidavits submitted by the employer. The Regional Director had issued his decision without a hearing and the employer had assumed that upon filing its request for heview by the Board, the Regional Director would transmit to the Board all the material that had been presented to or considered by him.

This court, relying on 29 C.F.R. § 102.69(g) and *Prestolite Wire Division v. NLRB*, 592 F.2d 302 (6th Cir. 1979), held that it was the Regional Director's responsibility to transmit the record, including the affidavits, to the Board and that his failure to do so required a denial of enforcement. In *Prestolite*, the Sixth Circuit had held that "[w]ithout expressly ruling that the Regional Director is invariably required under Section 102.69(g) to transmit to the Board all of the materials considered by him (although the language says 'shall'), we think that the better practice is to do so and we are unable to fault the company for having failed to anticipate that this procedure would not have been followed here."[2] *Id.* at 305. In adopting the *Prestolite* reasoning, this court stated:

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[2] Section 102.69(g), as it read at the time, provided:

The notice of hearing, motions, rulings, orders, stenographic report of the hearing, stipulations, exceptions, documentary evidence, together with the objections to the conduct of the

> We are asked to construe a somewhat ambiguous regulation, 29 C.F.R. § 102.69(g) . . . .
>
> The Board argues that 29 C.F.R. § 102.69(g) supports its assertion that it was Cambridge Wire's responsibility to transmit the record. Subsection (g) permits the party filing objections to "append to its submission to the Board copies of documents it has timely submitted to the regional director and which were not included in the report or decision." As did the Court in *Prestolite Wire*, we do not find that this language imposes responsibility on Cambridge Wire to transmit to the Board all the material it furnished the Regional Director in his investigation.

Cambridge Wire, 622 F.2d at 1199.

The Board replies that in response to the *Prestolite* decision (and, presumably, *Cambridge Wire*), the Board amended § 102.69(g), effective September 14, 1981, to make it clear that it is the employer's, and not the Regional Director's, responsibility to file supporting affidavits with the Board. We agree that new § 102.69(g) requires a result contrary to that reached in *Cambridge Wire*. The new section clearly provides that supporting affidavits are not part of the record unless submitted to to the Board by the employer and that "[f]ailure to

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> election or conduct affecting the results of the election, any report on such objections, any report on challenged ballots, exceptions to any such report, any briefs or other legal memoranda submitted by the parties, the decision of the regional director, if any, and the record previously made as described in § 102.68, shall constitute the record in the case. Materials other than those set out above shall not be a part of the record; except that in a proceeding in which no hearing is held, a party filing exceptions to a regional director's report on objections or challenges, a request for review of a regional director's decision on objections or challenges, or any opposition thereto, may append to its submission to the Board copies of documents it has timely submitted to the regional director and which were not included in the report or decision.

timely . . . append that evidence to its submission to the Board . . . shall preclude a party from relying on such evidence." [3] Furthermore, in a notice included at the end of his decision, the Regional Director informed Employer that it was its responsibility to transmit the affidavits to the Board.[4]

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[3] New § 102.69(g) provides, in pertinent part:

(g)(1)(ii) In a proceeding pursuant to this section in which no hearing is held, the record shall consist of the objections to the conduct of the election or to conduct affecting the results of the election, any report on objections or on challenged ballots and any exceptions to such a report, any regional director's decision on objections or on challenged ballots and any request for review of such a decision, any documentary evidence, excluding statements of witnesses, relied upon by the regional director in his decision or report, any briefs or other legal memoranda submitted by the parties, and any other motions, rulings, or orders of the regional director. Materials other than those set out above shall not be a part of the record, except as provided in paragraph (g)(3) of this section.

* * *

(g)(3) In a proceeding pursuant to this section in which no hearing is held, a party filing exceptions to a regional director's report on objections or challenges, a request for review of a regional director's decision on objections or challenges, or any opposition thereto may support its submission to the Board by appending thereto copies of documentary evidence, including copies of any affidavits, it has timely submitted to the regional director and which were not included in the report or decision. Documentary evidence so appended shall thereupon become part of the record in the proceeding. Failure to timely submit such documentary evidence to the regional director, or to append that evidence to its submission to the Board in the representation proceedings as provided above, shall preclude a party from relying on such evidence in any subsequent related unfair labor practice proceedings.

[4] The notice informed Employer:

Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the Board in Washington, D.C. Under the provisions of Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to

III.

Employer next claims that the Board erred by not granting a hearing on the issue of John's eligibility to vote. The Board is required by "both due process of law and the Rules and Regulations of the Board itself" to hold a post-election hearing when the objecting party raises a "substantial and material issue of fact relating to the validity of a representation election." *The Methodist Home v. NLRB*, 596 F.2d 1173, 1178 (4th Cir. 1979). *See* 29 C.F.R. §§ 102.69(c)(1), 102.69(d) ("hearing shall be conducted with respect to those objections or challenges which the regional director concludes raise substantial and material factual issues"). Whether there is such a material and substantial factual issue is "a question of law and ultimately a question for the courts." *NLRB v. Bata Shoe Co.*, 377 F.2d 821, 826 (4th Cir.), *cert denied*, 389 U.S. 917 (1967). Furthermore, it is not sufficient for an employer merely to question the interpretation of or legal conclusions drawn from the facts by the Regional Director. *See Macomb Pottery Co. v. NLRB*, 376 F.2d 450, 453 (7th Cir. 1967); *NLRB v. Sun Drug Co.*, 359 F.2d 408, 414 (3d Cir. 1966).

The critical legal conclusion drawn by the Regional Director was that John was a part-time, and not a seasonal, employee.[5] That legal conclusion allowed the Re-

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the Acting Regional Director in support of its challenges and objections and which are not included in the Report, are not a part of the record before the Board unless appended to the exceptions or opposition thereto which a party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Acting Regional Director and not included in the Report shall preclude a party from relying upon that evidence in any subsequent related unfair labor practice proceedings. Exceptions must be received by the Board in Washington by March 29, 1982.

[5] Because we decide that a hearing should have been granted, we do not reach the question of whether this conclusion is supported by substantial evidence.

gional Director to apply the objective number of hours test, which test the Board does not apply to seasonal employees. *See Davison-Paxon Co.*, 185 NLRB 21 (1970). The conclusion is based on the Regional Director's factual finding that Employer's need for John's services was based on the periodic availability of work rather than on peak season demand.[6] That finding, however, is a resolution of the substantial and material factual issue raised by Employer. Employer's affidavits contain allegations that are *prima facie* sufficient to support the opposite finding that the need for John's services was dependent upon the Christmas peak season: (1) Employer experienced a Christmas peak season; (2) Employer maintains a pool of peak season employees; (3) John was hired to work only on a peak season basis; (4) John was paid less than and received none of the benefits available to full-time employees and had no assurance of recall; and (5) John, in fact, worked primarily during the Christmas peak season and stopped work thereafter. *See Seneca Foods Corp.*, 248 NLRB 1119 (1980); *See's Candy Shops, Inc.*, 202 NLRB 538 (1973); *United Foods, Inc.*, 174 NLRB 91 (1969). While other facts might tend to support the Regional Director's conclusion,[7] whether that conclusion is supported by substantial evidence is a question apart from whether Employer was entitled to a hearing on the underlying factual issue. We believe that Employer's allegations created a substantial

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[6] The dissent argues that this finding raises no separate issue of fact but depends on a legal conclusion alone—whether John was a part-time or seasonal employee. The question of what motivated Employer to call John to work, however, seems clearly to be a factual question, the resolution of which leads to a legal conclusion concerning John's status at work.

[7] We note, however, that employees have been held to be seasonal employees even though they worked sporadically outside the busy season, *NLRB v. Sandy's Stores, Inc.*, 398 F.2d 268 (1st Cir. 1968), or performed the same duties as regular employees, *See's Candy Shops, Inc.*, 202 NLRB 538 (1973).

and material issue of fact and that Employer is entitled to a hearing on that issue.

IV.

During the past ten years, the Board has flip-flopped several times on the standard to be applied in determining whether an election should be set aside where the successful party has made a material misrepresentation during the campaign. Under *Hollywood Ceramics Co.*, 140 NLRB 221, 224 (1962), an election would be set aside where the misrepresentation "may reasonably be expected to have a significant impact on the election," and was made at a time when the other party could not make an effective reply. In 1977, the Board overruled *Hollywood Ceramics* to the extent that it permitted the setting aside of an election because of misleading campaign statements. *Shopping Kart Food Market*, 228 NLRB 1311 (1977). The *Hollywood Ceramics* test then was reinstated in *General Knit of California, Inc.*, 239 NLRB 619 (1978), but *General Knit* itself was overruled and the *Shopping Kart* test reinstated in *Midland Nat'l Life Ins. Co.*, 263 NLRB No. 24, 110 L.R.R.M. 1489 (1982). At present, the Board "will not set elections aside on the basis of misleading campaign statements," but "will . . . intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is." *Id.* at 1494.

Midland was decided subsequent to the Board's decision in this case and Employer would have us apply it prospectively only. Appellate courts, however, ordinarily apply the law in effect at the time of the appellate decision. *Bradley v. School Board of Richmond*, 416 U.S. 696, 711 (1974). Where, as here, there is an intervening change of agency policy, the central question is "whether giving the change retrospective effect will best effectuate the policies underlying the agency's governing act," and that question is committed, in the first instance,

to the agency's sound discretion. *NLRB v. Food Store Employees Union*, 417 U.S. 1, n.10 (1974). The Board clearly has indicated that *Midland* should apply to this case. In *Midland*, the Board balanced the hardships imposed by retroactivity against the prospect of producing results contrary to the statutory design and determined that *Midland* would apply "to all pending cases in whatever stage."[8] *Midland*, 110 L.R.R.M. at 1494 n.24. Indeed, the only hardship to employer is that, in reliance on the *Hollywood Ceramics/General Knit* standard, it refrained from making any misrepresentations of its own during the campaign. We thus join those other courts of appeals that have applied *Midland* retroactively. *See NLRB v. Monarch Boat Co.*, No. 82-1963 (8th Cir., filed July 22, 1983); *NLRB v. Milwaukee Brush Mfg. Co.*, 705 F.2d 257 (7th Cir. 1983); *NLRB v. Rollingon Corp.*, 702 F.2d 589 (5th Cir. 1983).

Nevertheless, since Employer's objections were drawn under the *Hollywood Ceramics/General Knit* standard and no hearing was held on the misrepresentations issue, we cannot determine whether the alleged misrepresentations included the kind of forged document use discussed in *Midland*. Thus, on remand, Employer should be given the opportunity to amend its objections in light of the *Midland* standard. Furthermore, we decline to resolve Employer's challenge to the validity of the *Midland* standard. Given the incompleteness of the record before us, resolution of that challenge would be premature.[9]

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[8] This case is unlike *Cedar Coal Co. v. NLRB*, 678 F.2d 1197, 1199 (4th Cir. 1982), where we declined to apply retroactively another Board decision because the Board had "not indicated its policy on retroactive application to earlier Board decisions which have been appealed." We read the "to all pending cases in whatever stage" statement to mean that the Board would apply *Midland* to earlier decisions that have been appealed, including this one.

[9] Employer claims that it was entitled to a hearing on the misrepresentation issue. The Board affirmed the Regional Director's overruling, without a hearing, of Employer's objections 2-5 on the

V.

For the foregoing reasons, the Board's order is vacated and the case is remanded to the Board for further proceedings.

VACATED AND REMANDED.

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grounds that they failed to establish a *prima facie* case for setting aside the election under the *Hollywood Ceramics/General Knit* standard. On appeal, the Board does not argue that the objections did not warrant a hearing under the *Hollywood Ceramics/General Knit* standard. Rather, it argues that the *Midland* standard applies and since the objections contain no allegation of union use of forged documents, Employer failed to allege a *prima facie* case. Thus, no hearing was required. On remand, if the Board decides that the *Hollywood Ceramics/General Knit* standard should apply—although, as discussed above, we believe the Board clearly has indicated that *Midland* applies to this case—then Employer is entitled to a hearing on the misrepresentation issue. A central issue in the Union campaign was the level of employee benefits and Objections 2-4 contain allegations of material misrepresentations concerning benefits. Whether Employer is entitled to a hearing if the *Midland* standard is applied will depend on the allegations in the amended objections.

SPROUSE, Circuit Judge, dissenting:

I respectfully dissent.

I disagree with the pivotal point of the majority decision—that National Posters raised substantial issues of fact about Samuel John's employment status requiring a hearing by the Regional Director.

A post-election hearing undoubtedly must be conducted when the objecting party raises a "substantial and material issue of fact relating to the validity of a representation election." *Methodist Home v. NLRB, supra.* One cannot, however, raise a substantial issue of fact merely by questioning the interpretation of the Regional Director's findings. *Macomb Pottery Co. v. NLRB*, 376 F.2d 450, 453 (7th Cir. 1967); *NLRB v. Sun Drug Co.*, 359 F.2d 408, 414 (3d Cir. 1966).

The Director carefully considered all the objective evidence before reaching a decision on John's employment status. He correctly credited John with working at least some hours in each month from June through December, 1981. He found that John was paid slightly less and received fewer benefits than his co-workers because he had only recently been employed. He found, however, that John worked shoulder to shoulder with full-time employees, performing the same job assignments and reporting to the same supervisors.

National Posters relies on the affidavit of Earl Seth, its president and sole owner, as sufficient to raise a substantial and material issue of fact as to whether John was a "part-time" or "seasonal" employee. Seth's affidavit essentially stated his subjective view that he had hired John in anticipation of increased seasonal work. The Regional Director, in rejecting this bare assertion, based his findings on uncontested documented evidence. In my mind, the entirely subjective intent of the employer under these circumstances is entitled to little

weight. Specific and objective facts from company records were introduced into evidence and fully considered by the Regional Director. A single self-serving, and entirely subjective, impression simply does not have the probative force to create an issue of fact when measured against that evidence.

I have, moreover, a more fundamental difference with the majority opinion. It states: "the critical legal conclusion drawn by the Regional Director was that John was a part-time, and not a season employee . . . . The conclusion is based on the Regional Director's factual finding that Employer's need for John's services was based on the periodic availability of work rather than on peak season demand. That finding, however, is a resolution of the material factual issue raised by Employer."

I suggest that my respected colleagues have not separately stated a legal conclusion and a factual finding upon which it was based; rather, they have simply taken the legal conclusion—that John was a part-time employee and recategorized it as a finding of fact under the cloak of factual terminology. The Director's findings of fact were that John worked a stated number of hours in each month, received a certain level of pay and benefits, and worked "shoulder to shoulder" with regular employees. The Director *concluded* from these facts that John's service was based on the periodic availability of work. This was, at least, an ultimate conclusion of fact from which only one conclusion of law was possible—that John was a part-time employee. To create an issue of fact under the circumstances of this case, National Posters must offer evidence, by affidavit or otherwise, contradicting the Director's factual findings as to hours worked, job assignments, and the conditions of his employment. Instead, it by affidavit merely disputed the inferences and conclusions drawn by the Regional Director from record facts. I feel the Board correctly rejected the contention that such a subjective impression created a substantial

and material issue of fact. *Macomb Pottery Co. v. NLRB*, 376 F.2d 450, 453 (7th Cir. 1967); *NLRB v. Sun Drug Co.*, 359 F.2d 408, 414 (3d Cir. 1966).

I agree with the majority that the standard announced by the Board in *Midland* controls the misrepresentation issues, but since National Posters raised no *Midland* issues, I do not feel a remand is necessary.

I would enforce the Board's order.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 5

Case 5-RC-11680

NATIONAL POSTERS, INC., AND NATIONAL LITHO, A DIVISION OF NATIONAL POSTERS, INC.,
Employer

and

BALTIMORE PRINTING PRESSMEN AND ASSISTANTS UNION #61
Petitioner

REPORT ON CHALLENGES AND OBJECTIONS

Pursuant to a Stipulation for Certification Upon Consent Election [1] approved by the undersigned on November 10, 1981, a secret-ballot election was conducted under his supervision on December 15, 1981, with the following results:

Approximate number of eligible voters	53
Void ballots	0
Votes cast for Petitioner	24
Votes cast against participating labor organization	21
Valid votes counted	45
Challenged ballots	4
Valid votes counted plus challenged ballots	49

[1] The unit is: "All production and maintenance employees including truck drivers, employed by the Employer at its 800 Debelius Avenue, Baltimore, Maryland and 4206 Shannon Drive, Baltimore, Maryland locations; but excluding all office clerical employees, guards and supervisors as defined in the Act." The eligibility period is the payroll period ending Sunday, November 8, 1981.

The challenged ballots affect the results of the election.

Timely objections to conduct affecting the results of the election were filed by the Petitioner and the Employer on December 22, 1981.[2]

THE CHALLENGES

The Employer challenged the ballot cast by Samuel John on the grounds he was a casual employee, and therefore not eligible to vote. Petitioner challenged the ballots cast by Albert Amend and Wesley Souders on the grounds they were supervisors and/or managerial employees within the meaning of the Act. Additionally Petitioner challenged the ballot cast by Robert Beddoe on the grounds he was an office clerical employee, and therefore not eligible to vote.

SAMUEL JOHN

With respect to the challenged ballot of Samuel John, Petitioner contends he is eligible as a regular part-time employee but failed to submit evidence in support of its position. The Employer maintains John was hired in June 1981, as a casual, seasonal employee who is "on call" to perform the job of "racking"[3] on an as-needed basis. John is paid the minimum wage ($3.35 per hour), while the Employer's two full-time rackers earn $3.47 and $4.37 per hour respectively. Unlike John, their salaries increase with their length of service. Moreover, John does not receive any of the benefits enjoyed by other employees such as health and welfare insurance, vacation pay, sick pay or holiday pay.

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[2] The petition was filed on October 22, 1981. The undersigned will consider on its merits only that alleged interference which occurred during the critical period which begins on and includes the date of the filing of the petition and extends through the election. *Goodyear Tire and Rubber Company,* 138 NLRB 453.

[3] Racking is a job essentially consisting of helping to lift sheets of completed posters off machines.

The Employer telephonically offers racking work to John when there is too much work for the two regular full-time rackers to complete. Inasmuch as the need for an extra racker fluctuates with the availability of jobs requiring racking, the Employer has had occasion to use John anywhere from one to over ten consecutive days. Conversely, there are periods during which John was not used for as much as three weeks. The table below lists the hours John has worked during the weekly pay periods covering his employment:

Week Ending (1981)	Hours Worked
6/30	9
7/3	0
7/10	0
7/17	0
7/24	36
7/31	8
8/7	0
8/14	0
8/21	0
8/28	22½
9/4	0
9/11	0
9/18	0
9/25	30½
10/2	43¾
10/9	0
10/16	0
10/23	27
10/30	36
11/16	45
11/13	51¼
11/20	47¾
11/27	28¾
12/4	8½
12/11	35¾
12/18	50
12/25	26¼
January 2, 1982	16

The Employer maintains that John's increased hours between October and December reflect the Employer's seasonal increase in business as well as the Employer's acquisition of a "large account" which necessitated racking. John has not worked since the payroll period ending January 2, 1982, because the seasonal period has ended and because the "large account" has been completed.

The Board normally determines eligibility for part-time and on-call employees on the basis of a representative period, in some cases, the three month quarter which immediately precedes the eligibility date. *Motor Transport Labor Relations, Inc.*, 139 NLRB 70, 72; *Davison-Paxon Company*, 185 NLRB 21, 23; *Sears, Roebuck and Co.*, 193 NLRB 330; *Hardy Herpolsheimer's—A Division of Allied Stores of Michigan, Inc.*, 227 NLRB 652. In several cases the Board has found part-time and on-call employees eligible to vote if they regularly averaged four hours of work per week in the quarter preceding the election. *Davison-Paxon Company, supra.; V.I.P. Movers, Inc.*, 232 NLRB 14. Moreover, in some cases cited herein the Board has applied these standards even though part-time and on-call employees receive different benefits than regular full-time employees. *V.I.P. Movers, Inc., supra.* As noted above, the Employer contends John is a seasonal and/or casual employee. This conclusion does not follow from the facts supplied by the Employer. The Employer's need for John's services is more dependent upon the availability of jobs requiring extra racking, than upon particular peak periods of the business year. In this regard, it is noted that John, following his hire in June 1981, worked during each of the six successive months. When John reports to work he performs racking duties also performed by full-time rackers who were eligible to vote. Moreover, John labors "shoulder to shoulder" with employees regularly assigned to operate printing presses and he is supervised by the supervisor of the regular full-time and part-time employees.

In view of the above, and considering that John averaged in excess of four hours per week in each of the two quarters preceding the election, it appears John has a substantial community of interest with other employees. Accordingly, the undersigned recommends the challenge to his ballot be overruled.

ALBERT AMEND AND WESLEY SOUDERS

With respect to the challenged ballots of Albert "Pete" Amend and Wesley Souders, Petitioner contends they are supervisors within the meaning of the Act because, *inter alia*, they receive greater wages and benefits than other employees, enjoy different working conditions and exercise independent judgment in matters such as hiring, firing, disciplinary section, assignment of work and the adjustment of grievances. Conversely, the Employer asserts that Amend and Souders are merely working foremen and do not have the supervisory authority alleged by the Petitioner. Inasmuch as the challenges to the ballots of Amend and Souders raise substantial issues of fact which can best be resolved by record testimony, the undersigned recommends a hearing be held with respect to the challenges of Albert Amend and Wesley Souders.

ROBERT BEDDOE

Regarding the challenge to the ballot cast by Robert Beddoe, Petitioner contends he is an office clerical and, therefore, does not share a sufficient community of interest with the eligible employees. Petitioner failed to submit any evidence in support of its challenge. The Employer contends Beddoe is eligible to vote in the election inasmuch as he is a shipping clerk spending substantial time working in the plant among other eligible employees. According to the testimony of Earl Seth, Jr., president of the Employer, Beddoe is responsible for keeping the inventory of paper stock as it proceeds through the plant. In addition, Beddoe loads and un-

loads trucks and actually moves paper supplies around the plant via forklifts. Beddoe also lifts and stores paper stock when it is delivered to the National Litho facility and works in the warehouse. Finally, Seth asserts that Beddoe does not perform typing and secretarial functions at National Litho inasmuch as the Employer employs another employee who is responsible for those duties. Based upon the evidence submitted during the investigation it appears that Beddoe is a plant clerical employee since his duties are directly related to unit work and are, in fact, largely performed in the plant where other employees work. *Risdon Manufacturing Company*, 195 NLRB 579. Accordingly, the undersigned recommends the challenge to his ballot be overruled.

THE EMPLOYER'S OBJECTIONS

Objection 1

> Throughout the week prior to the election, representatives of the Petitioner, including President Gerald L. Brown, told numerous employees that Earl Seth, Sr., President of the Company, had spent large amounts of company funds on presents for his children (i.e., a large tract of expensive property for his daughter). The Union made these statements, which were completely false, during visits to the homes of the employees, of which the Employer was unaware until after the election. The Union's purpose in making these misrepresentations was to indicate that the Employer had more money available than it was telling the employees, and/or to indicate that the Employer was committing malfeasance in spending the money which it did have. This monetary issue was one of the central issues in the campaign due to a recent decrease in wages and benefits resulting from the company's financial condition.

In support of this Objective, the Employer submitted the statement of its President and sole owner, Earl Seth, Jr., as well as the statements of two employees eligible to vote in the election. According to Seth, following the election several employees told him that Petitioner representatives, including Union President Gerald L. Brown, had visited the employees' homes a few days prior to the election and told them, *inter alia*, that Seth had spent large sums of money on presents for his children, three of whom are employed by the Employer. The employees told Seth the Petitioner's representatives stated the presents included the purchase of a large farm for Seth's daughter and similar gifts for his other children, money which supposedly should have been spent on behalf of Seth's other employees. The Employer contends Seth did not learn of Brown's statements until after the election. According to the employee statements submitted in support of this Objection, about a week prior to the election Brown stated the Employer had money available (for the employees) and that Earl Seth had bought a lot of property for his children. One employee witness states Brown told him Seth had purchased "a lot of property" for his daughter's wedding present and Brown either characterized the property as consisting of 30 acres or as costing $30,000. The Employer denies the contents of the statements attributed in Brown. The Employer maintains its financial status was a central campaign issue especially since the Employer had been forced to lay off several employees and impose an across-the board ten percent pay reduction in October 1981. The Petitioner denies having engaged in objectionable conduct as described in Objection 1.

The Board has held an election may be set aside where a party engages in last-minute misrepresentations involving a substantial departure from the truth which may reasonably be expected to have a significant impact on the election. *General Knit of California, Inc.*, 239 NLRB

619. Moreover, the Board has been sensitive to union misrepresentations regarding the financial status and activities of an employer during a campaign in which such matters are central to the employees. In *Comier Hosiery Mills, Inc.*, 243 NLRB 19, the Board directed a new election based upon the Union's misrepresentations that the Employer's poor financial statement was the result of an inprudent two million dollar loan by the Employer to a wholly owned subsidiary. In fact, the Employer had not made such a loan. In the instant case, however, even assuming, *arguendo*, that the Employer's allegations are accurate, this merely establishes that the Petitioner represented: 1) the sole owner of the Employer had money available and; 2) had purchased a substantial amount of property and gifts for his children. The Employer's evidence does not show the Petitioner accused Seth of corporate malfeasance. In all these circumstances, it does not appear reasonable to conclude that Petitioner's alleged misrepresentations affected the results of the election. Accordingly, the undersigned recommends Employer's Objection 1 be overruled in its entirety.

Objection 2

Representatives of the Petitioner also materially misrepresented the Union's pension plan by stating or implying that the employees would automatically be entitled to participate in the Union's plan upon voting in the Union, and that the employees' participation in the plan would be automatically paid for out of union dues.

Objection 3

Representatives of the Union materially misrepresented the health and welfare benefits to which the employees would be entitled if the Union were selected as the employees' representative, stating or implying that all of Local 61's contracts contained all the health and welfare benefits being promised by

the Union, and leading the employees to believe they would automatically be entitled to optical coverage and other benefits upon mere payment of dues following certification of the Union.

Objection 4

The Union representatives misrepresented to numerous employees the amounts of dues which the employees would have to pay to join the union.

Objection 5

The Union made various false and misleading statements to the employees during the days immediately prior to the election. Each of these statements and the statements described above misrepresented material and significant facts, to which the Employer had no effective opportunity to reply, and constituted such improper conduct as to destroy the conditions necessary to a fair and impartial election.

Due to certain similarities, Employer's Objections 2, 3, 4, and 5 will be discussed together.

In support of these Objections the Employer submitted the statements of President Seth and Supervisors Janis Trogden and Dave Sutphin. In their statements, Seth, Trogden and Sutphin described how employees, during a post election company meeting, apprised them of numerous misrepresentations made by Petitioner during the election campaign. The employee told the Employer, Petitioner's agents had falsely stated or implied that employees would automatically be entitled to participate in the Union's pension plan upon Union certification, and that the employees' participation in the plan would be automatically paid for out of union dues. According to the Employer, employees also claimed that union representatives inaccurately represented that if Petitioner won the election employees would be entitled to all benefits contained in a standard union health plan such as free

optical coverage. Further, Petitioner allegedly claimed that employee participation in the health plan would be paid for out of union dues. Finally, Seth, Trogden and Sutphin describe how the employees told them that Petitioner's agents claimed the union dues would be $15 per month. The Employer contends the actual union dues are $21 per month for apprentices and $23 per month for journeymen. Further, the Employer asserts it did not have an opportunity to reply to Petitioner's misrepresentations since the Employer did not learn of them until after the election. Petitioner denies the allegations contained in Objectives 2, 3, 4 and 5.

By mailgram dated December 23, 1981, the Employer was advised as follows:

> Objections received. As set forth in Notice of Procedures served with the Notice of Election in this case, submit all affidavits, signed statements, documents, other supporting evidence. Absent receipt by December 30, 1981 of specific evidence which *prima facie* would warrant setting aside the election and objections will be dismissed. Section 102.69 of the rules and regulations requires immediate service of objections on other parties.

The Employer's representative was also given a copy of the above-noted Notice of Proceedings by the Board agent who conducted the election on December 15, 1981. As set forth above, the Employer was notified on three separate occasions that the Notice of Procedures specifically requires the objecting party to submit evidence which *prima facie* warrant setting aside the election. Moreover, paragraph 3(a) of the Notice of Procedures fully apprised the Employer of the Region's requirements as to the form of the evidence submitted:

> As to witnesses, a list of all witnesses whose testimony is relied on to support the objections, together with the written statements or affidavits incorporat-

ing the witnesses' testimony and *signed by the witness.*

In support of Objections 2, 3, 4 and 5, the Employer merely submitted the hearsay statements of three supervisors. The Employer failed to provide a statement from any of the employees who witnessed the alleged acts of Petitioner misconduct described in Objections 2, 3, 4 and 5. Accordingly, in light of the Employer's failure to comply with established Board procedures and the specific instructions of the undersigned to provide signed statements of witnesses, the undersigned recommends Employer's Objections 2, 3, 4 and 5 be overruled in their entirety. *Bob G. Lewis d/b/a Classic Courts,* 246 NLRB 603.

THE PETITIONER'S OBJECTIONS

Objection 1

> Subsequent to the filing of the petition herein and prior to the election on December 15, 1981, the Employer, by and through its agents, representatives, and others, began making payments for health care benefits on behalf of employees, in order to persuade said employees to oppose Petitioner.

In support of this Objection, Petitioner submitted the statements of several employees who testified prior to July 1981, the Employer furnished employees a free health plan, but, in August 1981, the Employer required employees to pay for the plan, apparently due to the poor financial status of the Employer. The employee witnesses further state on or about November 15, 1981, after the Union campaign began, the Employer reestablished its practice of providing the plan to employees free of charge. Petitioner contends the Employer's conduct in November was designed to persuade employees to oppose the Petitioner. The Employer desires the Petitioner's contentions. In support of its position the Employer furnished statements and profit/loss figures dem-

onstrating how the Employer's conduct was based entirely upon business conditions which were poor in the first half of 1981 and dramatically improved during the latter months of the year.

Accordingly, as it appears substantial and material issues of fact have been raised which can best be resolved by record evidence, the undersigned recommends a hearing be held with respect to Petitioner's Objection 1.

Objection 2

> Subsequent to the filing of the petition herein and prior to the election on December 15, 1981, the Employer, by and through its agents and representatives, propounded misleading and inflammatory campaign material in a clear and deliberate attempt to appeal soley to emotion and prejudice, thereby interfering improperly with the voters' free choice in the election.

Objection 6

> By the foregoing, and by other acts and conduct, the Employer, through its agents, representatives, adherents and others, interfered with, restrained, and coerced eligible voters in the exercise of their rights under the Act and destroyed the requisite laboratory conditions necessary for the voters to make a free, fair, and reasoned choice in the election conducted herein.

Petitioner's Objections 2 and 6 will be discussed together.

The Petitioner had previously received the Notice of Procedures on two occasions and the December 13, 1981, mailgram, referred to above in Employer's Objections 2, 3, 4, and 5. Petitioner submitted no evidence in support of Objection 2 and no evidence of the "other acts and conduct" referred to in Objection 6.

Accordingly, inasmuch as Petitioner has failed to submit *prima facie* evidence in support of Objections 3 and 6, the undersigned recommends those Objections be overruled. *Bob G. Lewis d/b/a/ Classic Courts, supra.*

Objection 3

> Subsequent to the filing of the petition herein, and prior to the election on December 15, 1981, the Employer, by and through its agents and representatives discouraged employees from participating in the election, by changing the hours of work for certain second shift employees so that their work hours did not commence until one hour after the stipulated period for voting had terminated.

In support of this Objection, Petitioner submitted the statements of employees who describe how the Employer, on election day, changed the shift hours of the second shift employees assigned to the National Litho facility, one of two facilities involved herein. Prior to election day, the second shift hours had been 4:00 p.m. to 2:00 a.m. and on election day they were allegedly changed to 5:00 p.m. to 3:00 a.m. The voting hours at the National Litho facility were 3:30 to 4:00 p.m. Petitioner asserts the election day change in shift hours was unprecedented at National Litho and was designed to discourage second shift employees from voting in the election. The Employer denies Petitioner's allegations. According to the Employer, no change in shift hours occurred on election day. Although there is a dispute regarding the precise shift hours on election day, both parties agree all second shift employees eligible to vote in the election did, in fact, vote. This fact has been corroborated by the undersigned's review of the *Excelsior* list.

Assuming *arguendo* the shift change did occur, all eligible employees participated in the election. In these circumstances and absent evidence that the change in any way affected the results of the election, the undersigned recommends Petitioner's Objection 3 be overruled.

Objection 4

> Subsequent to the filing of the petition herein and prior to the election on December 15, 1981, the Employer, by and through its agents and representatives, failed and refused to provide Petitioner with accurate addresses for all employees listed on the *Excelsior* list, despite Petitioner's request that it do so.

In support of this Objection, Petitioner submitted the statements of its President, Gerald Brown. Brown states he made a mailing to employees upon his receipt of the *Excelsior* list on November 18, 1981. On or about November 20, 1981, Brown telephoned the Employer to inform President Seth that the Employer had furnished incorrect addresses for four named employees. Inasmuch as Seth was out of the office at the time, an unidentified person spoke with Brown and told him she couldn't do anything about the incorrect addresses, but she would inform Seth of the problem. Brown states Seth failed to return his call or correct the deficiencies on the list. According to Brown, a total of eight addresses were incorrect and, therefore, the Petitioner's campaign was hindered. Counsel for Petitioner concedes Brown may not have informed the Employer that the list contained more than four address errors. The Employer asserts it furnished the *Excelsior* list in full compliance with Board requirements. In support of its position, the Employer's president states its treasurer accurately prepared the list based upon the best records of the Employer. Counsel for the Employer contends that, even assuming, *arguendo*, the Employer was apprised of four address errors on or about November 20, 1981. the Employer was not obligated to investigate the matter and furnish the Board correct addresses.

The investigation reveals there were 56 names and addresses on the *Excelsior* list submitted by the Em-

ployer. According to Brown, the Employer failed to furnish accurate addresses of eight employees. Therefore, the percentage of alleged errors is approximately 14 percent. In addition, at the pre-election conference held on election day the parties agreed to add to the list the names of William Johnson, Brian Eckstein, and Samuel John, who was subsequently challenged by the Employer. Petitioner maintains it never received addresses on these three employees. Assuming, *arguendo*, these three employees are eligible voters, the Employer's list omitted names of approximately five percent of the employees.

The Board has held it will not apply the *Excelsior* rule mechanically and that, generally, the Board will not set aside an election due to an insubstantial failure to comply with the rule as long as the Employer has not been grossly negligent and has acted in good faith. *Texas Christian University*, 220 NLRB 396.

The issues present in this Objection are very similar to those resolved by the Board in *Texas Christian University, supra.* In that matter, 18 percent of the addresses on the list were inaccurate and there was a three percent omission rate. The Board recognized that the Employer prepared the list based upon its best records and was not aware of inaccuracies at the time the Employer submitted the list to the Board. Moreover, the evidence revealed the Employer, after its first mailing, discovered 11 address changes and received eight returned letters marked, "Address Unknown". The Employer took no action to correct its list following the discovery of the inaccuracies. The Board refused to sustain the Union's objection to this conduct even though the Employer may have been negligent by not disclosing the address changes it apparently received before the election. Regarding the omissions, the Board, while not condoning the Employer's actions, concluded that the errors were not so substantial as to require the setting aside of the election. Based upon the foregoing, it does not appear the Employer's conduct

in the instant matter was either grossly negligent or done in bad faith. See *West Coast Meat Packing Company, Inc.*, 195 NLRB 37. Accordingly, the undersigned recommends Petitioner's Objection 4 be overruled.

Objection 5

> In the hours immediately prior to the election, the Employer refused to release from work the employee previously designated by Petitioner as its observer, despite its verbal agreement, so that Petitioner was not permitted to have any observer present for the balloting.

In support of this Objection, Petitioner produced the statements of President Brown and employee Frank Liberto, its designated observer at the National Litho facility polling place. Brown states on November 27, 1981, he and the Employer's Counsel Harry Adelberg verbally agreed to utilize one observer each during the election.[4] They further agreed that one observer for each party would represent them at both polling places. In response to Adelberg's query, Brown told him Liberto or employee Patricia Hastings, both assigned to National Posters, would serve as Petitioner's observer. On December 14, Brown informed Liberto that he had been selected as Petitioner's observer. The next morning, Liberto asked his supervisor for permission to leave work at 2:45 p.m. in order to attend the 3:00 p.m. pre-election conference. Later that morning, Liberto's supervisor told him that Earl Seth denied the request because there was work for him to complete prior to the end of the shift at 4:00 p.m. Liberto's supervisor further told him Seth would have honored his request had Liberto notified the Employer in advance that he wished to leave prior to the completion of his shift. Liberto states he had only clean-

[4] The Employer, subsequent to the election date, retained new counsel.

up duties to perform the afternoon of December 15. The Employer denies having engaged in the conduct described in Objection 5. Counsel for the Employer maintains Liberto failed to make prior arrangements with his supervisor for his early release and at the time of the election Liberto could not be spared because supervisors had insufficient notice to arrange for a replacement. The Employer maintains that at the pre-election conference Petitioner made no effort to locate another employee to serve as its observer. Finally, it is noted that neither party utilized an observer at the National Litho facility polling place.

The Board has held where an observer is unavailable to a party, the election is not to be set aside in circumstances where the party's plight is attributable to its own lack of diligence. *San Francisco Bakery Employers Association*, 121 NLRB 1204, 1206; *Westinghouse Appliance Sales and Service Co., A Division of Westinghouse Electric Corporation*, 182 NLRB 481. Even though there is some dispute as to the urgency of the work Liberto performed the afternoon of the election, it does not appear Petitioner was sufficiently diligent in insuring that it's observer would be available to serve at the first polling session. Prior to election day, neither Petitioner nor Liberto told the Employer that Liberto would be an observer. Moreover, Petitioner waited until the day prior to the election to notify Liberto that he had been designated. In addition, when Petitioner learned that Liberto could not attend the first polling session it did nothing to procure a replacement. It is also noted that neither party had an observer at National Litho and finally, Petitioner has not claimed or shown that it was unable to challenge particular voters as a result of the Employer's alleged conduct. Based on the foregoing, Objection 5 does not constitute grounds for overturning the election. Accordingly, the undersigned recommends Petitioner's Objection 5 be overruled.

Summary

In summary, the undersigned recommends the challenges to the ballots cast by Robert Beddoe and Samuel John be overruled, their ballots counted and a Revised Tally of Ballots issue. If the Revised Tally indicates that Petitioner has received a majority of the valid votes cast, it will not be necessary to hold a hearing regarding the two remaining challenges and Petitioner's Objection 1. However, if the Revised Tally reveals no determinative result, it is recommended a hearing be held regarding the challenges to Albert Amend and Wesley Souders and Petitioner's Objection 1. Finally, the undersigned recommends Employer's Objections 1, 2, 3, 4 and 5 and Petitioner's Objections 1, 3, 4, 5, and 6 be overruled in their entirety.

Dated at Baltimore, Maryland this 16th day of March 1982.

/s/ Louis J. D'Amico
LOUIS J. D'AMICO,
Acting Regional Director
National Labor Relations Board,
Region 5
9100 Garmatz Federal Building and Courthouse
101 West Lombard Street, Ninth Floor
Baltimore, Maryland 21201

Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the Board in Washington, D. C. Under the provisions of Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Acting Regional Director in support of its challenges and objections and which are not included in the Report, are not a part of the record

before the Board unless appended to the exceptions of opposition thereto which a party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Acting Regional Director and not included in the Report shall preclude a party from relying upon that evidence in any subsequent related unfair labor practice proceeding. Exceptions must be received by the Board in Washington by March 29, 1982.

265 NLRB No. 115

D—9554
Baltimore, MD

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 5—CA—14585

NATIONAL POSTERS, INC., AND NATIONAL LITHO, A DIVISION OF NATIONAL POSTERS, INC.,

and

BALTIMORE PRINTING PRESSMEN AND ASSISTANTS UNION #61

DECISION AND ORDER

Upon a charge filed on August 6, 1982, by Baltimore Printing Pressmen and Assistants Union #61, herein called the Union, and duly served on National Posters, Inc. and National Litho, A Division of National Posters, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 5, issued a complaint on August 31, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (a) (5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on July 14, 1982, fol-

lowing a Board election in Case 5—RC—11680 [1], the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate; and that, commencing on or about August 3, 1982, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On August 26, 1982, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On October 12, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on October 18, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed an opposition to the Motion for Summary Judgment.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

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[1] Official notice is taken of the record in the representation proceeding, Case 5—RC—11680, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F. Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

Ruling on the Motion for Summary Judgment

In its answer to the complaint and opposition to the General Counsel's Motion for Summary Judgment, Respondent admits that the Union was certified, that it received a request to bargain, and that it has refused to bargain, but denies that it has violated Section 8 (a)(5) of the Act. Specifically, Respondent maintains that it has no obligation to bargain with the Union because the underlying certification of the Union was improperly issued inasmuch as the results of the election in Case 5—RC—11680 are invalid as a matter of law.

Review of the record herein, including the record in Case 5—RC—11680, reveals that, pursuant to a Stipulation for Certification Upon Consent Election, an election was conducted on December 15, 1981. The tally showed 24 votes for and 21 votes against the Union, with 4 challenged ballots. The Employer (and Petitioner) thereafter filed objections to conduct affecting the results of the election, as well as statements of position concerning the challenged ballots. Following an investigation, the Regional Director for Region 5, on March 16, 1982, issued a Report on Challenges and Objections in which he recommended that the Employer's objections be overruled, and that two challenged ballots be opened and counted. On March 31, 1982, the Employer filed exceptions to the report with the Board. Thereafter, on June 29, the Board issued a "Decision, Direction To Open and Count Certain Challenged Ballots, Contingent Direction of Hearing," in which it directed that the two challenged ballots be opened and that, if the two remaining challenged ballots were no longer determinative, the Regional Director issue a certification of representative. The Board further directed that, if the revised tally indicated that the two challenged ballots were determinative, that a hearing be held with respect to those challenged ballots, as well as with respect to Petitioner's Objection 1. The two challenged ballots were opened and

counted, with the revised tally showing 25 valid votes for and 22 against the Union, thereby making the remaining 2 challenged ballots nondeterminative. On July 14, 1982, the Regional Director issued a Certification of Representative.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[2]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

National Posters, Inc. and National Litho, A Division of National Posters, Inc., is a Maryland corporation engaged in the business of printing and sign creation at its 800 Debelius Avenue and 4206 Shannon Drive, Baltimore, Maryland, locations. During the past 12 months, a representative period, the Respondent purchased and

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[2] See *Pittsburgh Plate Glass Co.* v. *N[illegible].B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

received goods valued in excess of $50,000 directly from points located outside the State of Maryland.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Baltimore Printing Pressmen and Assistants Union #61 is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practice

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees including truck drivers, employed by the Employer at its 800 Debelius Avenue and 4206 Shannon Drive, Baltimore, Maryland locations; but excluding all office clerical employees, guards and supervisors as defined in the Act.

2. The certification

On December 15, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 5, designated the Union as their representative for the purpose of collective-bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on July 14, 1982, and the Union continues to be such exclusive rep-

resentative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about July 27, 1982, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about August 3, 1982, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since August 1, 1982, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive rep-

resentative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. National Posters, Inc. and National Litho, A Division of National Posters, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Baltimore Printing Pressmen and Assistants Union #61 is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees including truck drivers, employed by the Respondent at its 800 Debelius Avenue and 4206 Shannon Drive, Baltimore, Maryland locations; but excluding all office clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since July 14, 1982, the above-named labor organization has been and now is the certified and exclusive

representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about August 3, 1982, and at all times thereafter, to bargain collectively with the abovenamed labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Seceion 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, National Posters, Inc. and National Litho, A Division of National Posters, Inc., Baltimore, Maryland, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Baltimore Printing Pressmen and Assistants Union #61 as the exclusive bargaining repre-

sentative of its employees in the following appropriate unit:

> All production and maintenance employees including truck drivers, employed by the Employer at its 800 Debelius Avenue and 4206 Shannon Drive, Baltimore, Maryland locations; but excluding all office clerical employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its facilities at 800 Debelius Avenue and 4206 Shannon Drive, Baltimore, Maryland, copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure

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[3] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. December 10, 1982

JOHN H. FANNING, Member

HOWARD JENKINS, JR., Member

DON A. ZIMMERMAN, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Baltimore Printing Pressmen and Assistants Union #61 as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the abovenamed Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees including truck drivers, employed by the Employer at its 800 Debelius Avenue and 4206 Shannon Drive, Baltimore, Maryland locations; but excluding all office clerical employees, guards and supervisors as defined in the Act.

NATIONAL POSTERS, INC. AND
NATIONAL LITHO, A DIVISION
OF NATIONAL POSTERS, INC.

_____
(Employer)

Dated ..... By _____
(Representative) Title

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Candler Building, 109 Market Place, Suite 4200, Baltimore, Maryland 21202, Telephone 301—962—2772.

282 NLRB No. 148

D—4247
Baltimore, MD

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 5——CA——14585

NATIONAL POSTERS, INC. AND NATIONAL LITHO, A DIVISION OF NATIONAL POSTERS, INC.

and

BALTIMORE PRINTING AND PRESSMEN AND ASSISTANTS UNION #61

DECISION AND ORDER REMANDING FOR FURTHER HEARING

On 23 November 1984, Administrative Law Judge Bernard Ries issued the attached decision.[1] The Respondent filed exceptions, a brief in support of exceptions, and a motion to reopen the record. The Charging Party, Baltimore Printing Pressmen and Assistants Union #61), filed a brief in answer to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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[1] Although the judge refers to his decision as being a "supplemental" one, technically it is not since there has been no prior judge's decision issued in this case.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2] findings, and conclusions.

In its motion to reopen the record, the Respondent contends that it has evidence, which was previously unavailable, showing that Local #61, which the Board certified on 14 July 1982 as the bargaining representative of the Respondent's employees in an appropriate unit, no longer exists due to a merger between its parent organization. International Printing and Graphics Union, and Graphics Arts International Union. It claims that its evidence shows that Local #61's governing body was taken over by new officers and a new organizational structure of a different union with different dues and membership requirements, and that it now transacts business under a different name and structure known as Baltimore Graphics Communication Union, Local 61C. The Respondent thus contends that due to the changes resulting from the merger, the labor organization which was certified by the Board in 1982 is not the same organization which now seeks to obtain a bargaining order, and that the Board should reopen the record to allow it to introduce the previously unavailable evidence.

We find, in agreement with the Respondent, that a reopening of the record in this case is necessary to determine if the merger between International Printing and Graphics Union, and Graphic Arts International Union, so substantially changed Local #61 as to raise a question concerning its continued statute as the certified bargaining representative of the Respondent's unit employees.[3]

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[2] With respect to the challenged ballots that were opened and counted, we do not adopt the judge's speculation as to which challenged voters voted for the Union and which did not.

[3] In its brief to the Board in answer to the Respondent's exceptions, Local #61 admits that a merger occurred, but contends that the merger resulted only in a change of name. It further contends that the Respondent presented no evidence during the hearing to show that there has been a change in the identity and continuity

Pursuant to the Board's order of 6 April 1984 the sole issue before the judge involved the voter eligibility of employees Samuel John, Albert Amend, and Wesley Souders. Consequently, the question whether the merger of the two Internationals had affected Local #61's representative status was never raised nor litigated at the hearing. Further, the Respondent's claim, that the evidence in support of its assertion was previously unavailable, is not disputed by Local #61. Under these circumstances, we grant the Respondent's motion to reopen the record, and shall direct that a further hearing be held to determine if the merger between Local #61's parent organization, International Printing and Graphics Union, with Graphic Arts International Union, resulted in a substantial change in the identity of, and in a lack of continuity of representation by, Local #61 with respect to the Respondent's employees in the unit for which it was certified.[4]

ORDER

It is ordered that the record in this case be reopened and that a hearing be held before an administrative law judge for the sole purpose of adducing evidence on the question whether the merger between International Printing and Graphics Union and Graphic Arts International Union resulted in a substantial change in the identity of

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of Local #61 as bargaining representative as a result of the merger. However, as noted, infra, this issue was not before the judge for resolution.

[4] The Respondent's assertion, that its employees were denied due process because only union members were allowed to vote on the merger question, is without merit, see *NLRB v. Financial Institution Employees Local 1182*, 89 L.Ed.2d 151 (1986), as is its claim that the high turnover rate among its employees since the last election requires the holding of a new election. Accordingly, the sole issue for determination shall be whether the merger of the Internationals caused such a substantial change in Local #61 as to have affected its status as the certified bargaining representative of the Respondent's unit employees.

and in a lack of continuity of representation by Baltimore Pressmen and Assistants Union #61 with respect to the Respondent's employees in the unit for which it was certified.

IT IS FURTHER ORDERED that this case is remanded to the Regional Director for Region 5 for the purpose of arranging the hearing and that the Regional Director is authorized to issue notice thereof.

IT IS FURTHER ORDERED that upon conclusion of the hearing the administrative law judge shall prepare and serve on the parties a supplemental decision containing findings of fact based on the evidence received, conclusion of law, and recommendations. Following service of the decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall apply.

Dated, Washington, D.C. 4 February 1987

DONALD L. DOTSON, Chairman

MARSHALL B. BABSON, Member

JAMES M. STEPHENS, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

JD—451—84
Baltimore, MD

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case No. 5-CA-14585

NATIONAL POSTERS, INC. AND NATIONAL LITHO, A DIVISION OF NATIONAL POSTERS, INC.

and

BALTIMORE PRINTING AND PRESSMEN AND ASSISTANTS UNION #61

Namsoo Dunbar, Esq., of Baltimore, Maryland, for the General Counsel.

Robert L. Scott-Clayton, Esq. (Delson & Gordon), of Washington, DC, for the Charging Party.

Maurice Baskin, Esq. (Venable, Baetjer, Howard & Civiletti), of Washington, DC, for the Respondent.

SUPPLEMENTAL DECISION

Bernard Ries, Administrative Law Judge: On December 15, 1981, a representation election was conducted by Region 5 among the approximately 53 eligible voters at Respondent's two plants in Baltimore, Maryland.[1] The tally of ballots showed that 24 employees

[1] The unit description reads:

All production and maintenance employees including truckdrivers, employed by Respondent at its 800 Debelius Avenue,

voted in favor of Baltimore Printing Pressmen and Assistants Union #61, the Charging Party here ("the Union"). 21 unfavorable votes were cast, and 4 ballots were challenged.

Without holding a hearing, the Regional Director for Region 5, in his Report on Challenges and Objections issued on March 16, 1982, ruled, *inter alia*, that the ballot cast by employee Samuel John, which had been challenged by Respondent, and another ballot, which had been challenged by the Union, should be opened and counted. Further action on the remaining two challenges and a single Union objection to the conduct of the Employer was deferred pending the results of the revised tally of ballots. On June 29, 1982, the Board issued an order adopting the proposed procedure.

Thereafter, the two ballots were opened. John evidently voted for the Union, the other employee evidently did not, and the reviewed tally issued by the Region showed the Union ahead by 25-22.[2] On July 14, 1982, the Regional Director issued a Certification of Representative to the Union, and the Respondent thereafter refused to bargain in order to test the validity of the certification. Subsequently, the Region issued a complaint asserting the Respondent's refusal to bargain to be unlawful.

On December 10, 1982, the Board issued a Decision and Order in which it (1) granted General Counsel's motion for summary judgment on the ground that Respondent was attempting to relitigate matters previously adjudicated in a representation proceeding, and (2) held that Respondent was violating Section 8(a)(5) of

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Baltimore, Maryland and 4206 Shannon Drive, Baltimore, Maryland locations, but excluding all office clerical employees, guards and supervisors as defined in the Act.

[2] There is no direct documentation in this record of the manner in which the two employees voted, but that they voted as indicated seems obvious from the Court's opinion and the present posture of the case.

the Act by refusing to bargain with the Union. 265 NLRB No. 115 (not reported in published Board volumes).

On November 3, 1983, after review of the Board's Decision, the United States Court of Appeals for the Fourth Circuit held, contrary to the Board, that a hearing was required on the issue of Samuel John's eligibility to vote. 720 F.2d 1358.[3] Accordingly, by order dated April 6, 1984, the Board directed that a hearing be held "to determine if employee Samuel John was a regular part-time, or a seasonal, employee and to resolve the challenges to the ballots of Albert Amend and Wesley Souders." The right of alleged supervisors Amend and Souders to vote, a right challenged at the election by the Union, had not previously been resolved because, once the revised tally had issued in June 1982, the Union had enjoyed a lead of 25-22, thus making immaterial the votes of Amend and Souders. In directing the present hearing, the Board recognized that if it were finally decided that John's vote for the Union should have been disallowed, the ballots of Amend and Souders challenged by the Union could then become determinative by virtue of their potential for causing a tie vote.

Pursuant to the mandate of the Court and the Board, a hearing on the eligibility of John, Amend, and Souders was held before the undersigned on June 12, 20, and 21, 1984, and was finally closed by my Order Receiving Exhibits And Closing Hearing issued on August 27, 1984.[4]

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[3] The Court also authorized Respondent to amend its objections with regard to certain claims of Union election misrepresentations and, should Respondent so choose, to have those objections made the subject of a hearing as well. That potential avenue was not pursued and is no longer part of the case.

[4] In that Order, I received in evidence the following exhibits submitted on August 24, 1984, by the parties, which I have marked and included in the original exhibits file: the timecard of Samuel John for the payroll period ending January 1, 1982, marked as

On October 9, 1984, the Union and the Respondent filed briefs, which I have carefully considered in reaching the following findings of fact,[5] conclusions of law, and recommendation.

"Charging Party's Exhibit No. 1(s)") documents "prepared by employees of Delson & Gordon," counsel for the Union, purporting to summarize timecards produced by the Respondent for the period of time from payroll period ending January 7, 1981, to payroll period ending December 25, 1981, marked as "Charging Party's Exhibit No. 6"; a summary of wage rates earned by bargaining unit employees and individuals stipulated by the Respondent to be supervisors within the meaning of Section 2(11) of the Act in effect on or about December 15, 1981, marked as "Joint Exhibit No. 1"; and, finally, some 697 unpaginated and unchronological pages of various sizes reproducing timecards of full and part-time employees who performed bargaining unit work for the period of time from the payroll periods beginning January 7, 1981, and ending December 25, 1981, "submitted in response to Charging Party's Exhibit No. 6," and marked as "Joint Exhibit No. 2." Although the parties stipulated as to the authenticity of the documentary exhibits, they did not waive any objections to their "materiality, relevance or substance." I have also received in evidence the joint letter of submission of August 24, 1984, as "Administrative Law Judge's Exhibit No. 1."

[5] The following obvious errors in the transcript of proceedings are corrected for purposes of clarity:

Page	Line	Change	To
7	23	arguments	documents
14	7	procession	perception
15	5	shifting	shift and
37	18	own	on
39	7	don't have	note, however,
45	4	only a preseason	only on a peak season
45	8	worked	stopped work
46	16	expands to	experienced a
60	9	reporting	report on
60	10	decision	decision,
60	11	ballots, petition upon	ballots, contingent
86	10	plain	plane
96	11	in	him
96	17	a 10	an 8

[Continued]

I. The Eligibility of Samuel John

A. *The Prior Proceeding*

At the outset, it seems appropriate to recite the relevant portions of the remanding Court's majority opinion and the dissenting opinion of Judge Sprouse in order to clarify the governing legal framework. In discussing John's status, the majority stated (720 F.2d at 1359, 1360, 1362-63) :

> Employer challenged the vote of employee Samuel John. The challenge was supported by an affidavit submitted by [Respondent's president Earl] Seth, who indicated that he intended John to be employed only on a peak seasonal basis. John was hired in June, 1981 as a seasonal employee who is "on call' to perform the job of "racking." [1]

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[1] From the date of his hiring through the end of 1981, John worked the following number of hours during the weekly pay periods.

Week ending 1981	Hours Worked
6/30	9
7/3	0
7/10	0
7/17	0
7/24	36

[Continued]

[5] [Continued]

Page	Line	Change	To
105	18	two	two weeks
111	3	3.55	3.35
140	3		
(and *passim*)		Bernard	Ries
188	4	on-needed	as-needed
227	5	my	a
294	11	now, not	now, now
298	2		
(and *passim*)		Freudenberg	Ries
314	19	Judge Bernard	———
406	11	nine	nine hours

When John worked, he did so "shoulder-to-shoulder" with Employer's two full-time rackers. John was paid the minimum wage, $3.35 per hour, while the two full-time rackers earned $3.47 and $4.37 per hour respectively. Unlike John, salaries would increase with their length of service. John also did not receive any of the benefits enjoyed by full-time employees such as health and welfare insurance, vacation pay, sick pay, or holiday pay.

Employer's business experienced a seasonal surge of business during the Christmas rush season. Employer maintained a pool of seasonal employees who could work during that period of increased demand. Seasonal employees, including John, were free to work elsewhere when not working for Employer. These employees had no assurance of recall.

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[1] [Continued]

7/31	8
8/7	0
8/14	0
8/21	0
8/28	22½
9/4	0
9/11	0
9/18	0
9/25	30½
10/2	43¾
10/9	0
10/16	0
10/23	27
10/30	36
11/6	45
11/13	51¼
11/20	47¾
11/27	28¾
12/4	8½
12/11	35¾
12/18	50
12/25	26¼
1/2/82	16

Employer maintains that John's hours during late September through December reflect the Christmas rush and that John did not work after the payroll period ending January 2, 1982, because the Christmas rush period ended.

* * *

The Regional Director found that John was an eligible voter, rejecting Employer's claim that John was a seasonal employee. Instead, the Regional Director characterized John as a part-time employee, finding that "Employer's need for John's services is more dependent upon the availability of jobs requiring extra racking, than upon particular peak periods of the business year." The Regional Director considered the ruling supported by (1) John working in each of the six months prior to the December election, (2) John performing, when he did work, the same tasks as full-time workers and working shoulder-to-shoulder with those workers and (3) John being supervised by the supervisor of the full-time employees. The Regional Director then applied the Board's objective number of hours test for determining if part-time employees are eligible voters: part-time employees are eligible voters if they average four hours of work per week in the quarter preceding the election. *See V.I.P. Movers, Inc.*, 232 NLRB 14 (1977); *Davison-Paxon Co.*, 185 NLRB 21 (1970). Since John averaged more than four hours per week, he was found to be eligible.

The critical legal conclusion drawn by the Regional Director was that John was a part-time, and not a seasonal, employee.[5]

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[5] Because we decide that a hearing should have been granted, we do not reach the question of whether this conclusion is supported by substantial evidence.

That legal conclusion allowed the Regional Director to apply the objective number of hours test, which test the Board does not apply to seasonal employees. *See Davison-Paxon Co.*, 185 NLRB 21 (1970). The conclusion is based on the Regional Director's factual finding that Employer's need for John's services was based on the periodic availability of work rather than on peak season demand.[6] That finding, however,

[6] The dissent argues that this finding raises no separate issue of fact but depends on a legal conclusion alone—whether John was a part-time or seasonal employee. The question of what motivated Employer to call John to work, however, seems clearly to be a factual question, the resolution of which leads to a legal conclusion concerning John's status at work.

is a resolution of the substantial and material factual issue raised by the Employer. Employer's affidavits contain allegations that are *prima facie* sufficient to support the opposite finding that the need for John's services was dependent upon the Christmas peak season: (1) Employer experienced a Christmas peak season; (2) Employer maintains a pool of peak season employees; (3) John was hired to work only on a peak season basis; (4) John was paid less than and received none of the benefits available to full-time employees and had no assurance of recall; and (5) John, in fact, worked primarily during the Christmas peak season and stopped work thereafter. *See Seneca Foods Corp.*, 248 NLRB 1119 (1980); *See's Candy Shops, Inc.*, 202 NLRB 538 (1973); *United Foods, Inc.*, 174 NLRB 91 (1969). While other facts might tend to support the Regional Director's conclusion,[7] whether that conclusion

[7] We note, however, that employees have been held to be seasonal employees even though they worked sporadically outside the busy season, *NLRB v. Sandy's Stores, Inc.*, 398 F.2d 268 (1st Cir. 1968), or performed the same duties as regular employees, *See's Candy Shops, Inc.*, 202 NLRB 538 (1973).

is supported by substantial evidence is a question apart from whether Employer was entitled to a hearing on the underlying factual issue. We believe that Employer's allegations created a substantial and material issue of fact and that Employer is entitled to a hearing on that issue.

In dissent, Judge Sprouse reasoned (*id.* at 1364-65; emphasis in original):

> The Director carefully considered all the objective evidence before reaching a decision on John's employment status. He correctly credited John with working at least some hours in each month from June through December, 1981. He found that John was paid slightly less and received fewer benefits than his co-workers because he had only recently been employed. He found, however, that John worked shoulder to shoulder with full-time employees, performing the same job assignments and reporting to the same supervisors.
>
> National Posters relies on the affidavit of Earl Seth, its president and the sole owner, as sufficient to raise a substantial and material issue of fact as to whether John was a "part-time" or "seasonal" employee. Seth's affidavit essentially states his subjective view that he had hired John in anticipation of increased seasonal work. The Regional Director, in rejecting this bare assertion, based his findings on uncontested documented evidence. In my mind, the entirely subjective intent of the employer under these circumstances is entitled to little weight. Specific and objective facts from company records were introduced into evidence and fully considered by the Regional Director. A single self-serving, and entirely subjective, impression simply does not have the probative force to create an issue of fact when measured against that evidence.

I have, moreover, a more fundamental difference with the majority opinion. It states: "the critical legal conclusion drawn by the Regional Director was that John was a part-time, and not a seasonal employee. . . . The conclusion is based on the Regional Director's factual finding that Employer's need for John's services was based on the periodic availability of work rather than on peak season demand. That finding, however, is a resolution of the material factual issue raised by Employer."

I suggest that my respected colleagues have not separately stated a legal conclusion and a factual finding upon which it was based; rather, they have simply taken the legal conclusion—that John was a part-time employee and recategorized it as a finding of fact under the cloak of factual terminology. The Director's findings of fact were that John worked a stated number of hours in each month, received a certain level of pay and benefits, and worked "shoulder to shoulder" with regular employees. The Director *concluded* from these facts that John's service was based on the periodic availability of work. This was, at least, an ultimate conclusion of fact from which only one conclusion of law was possible—that John was a part-time employee. To create an issue of fact under the circumstances of this case, National Posters must offer evidence, by affidavit or otherwise, contradicting the Director's factual findings as to hours worked, job assignments, and the conditions of his employment. Instead, it by affidavit merely disputed the inferences and conclusions drawn by the Regional Director from the record facts. I feel the Board correctly rejected the contention that such a subjective impression created a substantial and material issue of fact. *Macomb Pottery Co. v. NLRB*, 376 F.2d 450, 453 (7th Cir. 1967); *NLRB v. Sun Drug Co.*, 359 F.2d 408, 414 (3d Cir. 1966).

I have juxtaposed excerpts from the two opinions at some length in order to attempt to delineate the legal fenceposts by which this case is now bounded.[6] It seems

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[6] To complete the picture and to supplement the Court's description of the arguments made to and by the Regional Director in this Report, the following quotation from the latter document also seems worth reproducing:

> The Employer maintains that John's increased hours between October and December reflects the Employer's seasonal increase in business as well as the Employer's acquisition of a "large account" which necessitated racking. John has not worked since the payroll period ending January 2, 1982, because the seasonal period has ended and because the "large account" has been completed.
>
> The Board normally determines eligibility for part-time and on-call employees on the basis of a representative period, in some cases, the three month quarter which immediately precedes the eligibility date. *Motor Transport Labor Relations, Inc.*, 139 NLRB 70, 72; *Davison-Paxon Company*, 185 NLRB 21, 23; *Sears, Roebuck and Co.*, 193 NLRB 330; *Hardy Herpolsheimer's—A Division of Allied Stores of Michigan, Inc.*, 227 NLRB 652. In several cases the Board has found part-time and on-call employees eligible to vote if they regularly averaged four hours of work per week in the quarter preceding the election. *Davison-Paxon Company, supra*; *V.I.P. Movers, Inc.*, 232 NLRB 14. Moreover, in some cases cited herein the Board has applied these standards even though part-time and on-call employees receive different benefits than regular full-time employees. *V.I.P. Movers, Inc., supra.* As noted above, the Employer contends John is a seasonal and/or casual employee. This conclusion does not follow from the facts supplied by the Employer. The Employer's need for John's services is more dependent upon the availability of jobs requiring extra racking, than upon particular peak periods of the business year. In this regard, it is noted that John, following his hire in June 1981, worked during each of the six successive months. When John reports to work he performs racking duties also performed by full-time rackers who were eligible to vote. Moreover, John labors "shoulder to shoulder" with employees regularly assigned to operate printing presses and he is supervised by the supervisor of the regular full-time and part-time employees.
>
> In view of the above, and considering that John averaged in excess of four hours per week in each of the two quarters

clear that the majority opinion views the critical question to be the nature of Respondent's intention with respect to its relationship with John: was Respondent's "need for John's services . . . based on the periodic availability of work rather than on peak season demand," as found by the Regional Director and the question which the majority calls "the substantial and material factual issue raised by" Respondent; or was John "hired to work only on a peak season basis," as Respondent asserted?[7] At the same time, however, the Court's citation of Board cases suggests an interest in conforming the result here to traditional Board doctrine.

B. *The Basic Evidence*

Respondent operates two plants in Baltimore. The larger plant, called National Posters, is primarily a silk screening operation, and the other, called National Litho, performs four-color offset printing some four blocks away. Together they have been found to constitute an appropriate unit for purposes of collective bargaining.

At the hearing, Samuel John testified that he was first employed by Respondent when, after applying for full-or part-time work at the office of National Posters, he received a telephone call to come to work at National Litho

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preceding the election, it appears John has a substantial community of interest with other employees. Accordingly, the undersigned recommends the challenge to his ballot be overruled.

[7] See also the majority's footnote 6, above, saying that "[t]he question of what motivated Employer to call John to work" is "clearly . . . a factual question, the resolution of which leads to a legal conclusion concerning John's status at work." I take the phrase "what motivated Employer to call John to work" to refer to Respondent's understanding of the degree of permanency of its relationship, if any, to John. This construction appears to be borne out by the majority's reference to the employer's allegations which would support "the opposite finding that the need for John's services was dependent upon the Christmas peak season."

in June 1981. His initial work at National Litho involved cleaning some presses for 2 days.[8]

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[8] I have earlier set out the employment records of John as reproduced by the Court of Appeals from the Regional Director's Report. An examination of the timecards now in evidence, however, discloses some apparent discrepancies.

For one thing, although there is a timecard for John showing 9 hours worked in the "Pay End 6/30/81," the other timecards show that the relevant pay period ended on July 1. There was no pay period ending "7/3," as shown in the Regional Director's Report; the next pay period, for some reason, ended on "7/10," according to all the other cards. Thus, John worked 9 hours in the period ending 7/1, and none in the next two—not three—pay periods.

Although the Regional Director found that John did not work in the period ending September 18, a timecard shows that he worked 2¾ hours during that week. Similarly, although the Regional Director stated that John did not work in the period ending October 16, two cards in evidence, one bearing an October 16 date and the other obviously related thereto, show that he worked 25¼ hours in the week ending on that date.

In the week ending 12/18, John did not work 50 hours, as found by the Region, but rather, according to this record, only 13¾ hours. Finally, I note that the Region found that John worked 16 hours for the period ending January 2, 1982. The card in evidence shows the period ending on January 1.

It thus appears that the following chart of John's employment more closely resembles his experience:

Week Ending	Hours Worked
7/1	9
7/10	0
7/17	0
7/24	36
7/31	8
8/7	0
8/14	0
8/21	0
8/28	22½
9/4	0
9/11	0

[Continued]

When next called to work, a few weeks later, John assembled and stacked cartons at National Litho for 5 days. Thereafter, when he worked for Respondent, it was principally at National Posters, where he was primarily engaged as a "racker," taking posters off a press and stacking them. However, he also continued to perform some cleaning and shipping work, occasionally returning to work at National Litho to do so. In performing all these jobs, John usually worked with other employees at the two locations. He received no benefits other than his pay of $3.35 an hour and overtime for work in excess of 40 hours a week.

Overt indications to John that the future promised an association with Respondent of any permanency were meager: on occasions when he was released after working for a few days, John would be told that he would "hear from them"; and once, sometime in the fall of 1981, he asked the son of Respondent's president if he could be employed full-time, to which Seth Jr. replied, "not at that time but he would consider it." [9]

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[8] [Continued]

9/18	2¾
9/25	30½
10/2	43¾
10/9	0
10/16	25¼
10/23	27
10/30	36
11/6	45
11/13	51¼
11/20	47¾
11/27	28¾
12/4	8½
12/11	35¾
12/18	34¾
12/25	26¼
1/1/82	16

[9] Seth, Jr. did not testify. For whatever it may be worth, I credit with, who made an excellent impression.

C. *Discussion*

Section 9(a) of the Act affords the right of recognition for purposes of collective bargaining to representatives selected by a majority of employees in "a unit appropriate for such purposes." In determining the scope of such "appropriate" units, the Board attempts to identify and group together those employees who share a "community of interest," *e.g., Kalamazoo Paper Box Corp.*, 136 NLRB 124, 136-38, a standard which is scarcely self-defining. See Judge Posner's discussion in *Continental Webb Press, Inc. v. NLRB*, 742 F.2d 1087 (C.A. 7).

One of the problems often encountered by the Board in deciding the eligible members of the unit electorate is caused by the presence of employes who do not work on a full-time basis. Generally speaking, these employees may either work with some frequency, but only part-time, throughout the year, or they may work primarily, although perhaps intensively, during a limited period of each year.

A review of the cases suggests that, over the years, the Board has been generous in granting access to the voting booth to individuals who can lay some claim to being "employees." To be eligible to vote, an employee need not satisfy any particularly stringent standard, such as having worked for at least 10 years, or having been promised lifetime employment by the employer, or being considered an indispensable worker. All that is normally required for purposes of voting eligibility, rather, is that the employee was on the payroll during the period immediately preceding the date of the direction of the election (or the agreement consenting to the election) and was still employed on the date of the election. E.g., *Columbia Pictures Corp.*, 61 NLRB 1030, 1038.

Thus, employees who may have only been in the workforce for a matter of weeks, and whose future with the

employer is wholly uncertain, are usually entitled to vote. This rule also applies to enfranchise even employees who have notified the employer of their intention to resign, but who are still working on the day of the election, *General Tube Company*, 141 NLRB 441, enfd. 331 F.2d 751 (C.A. 6). The fact that an employee has been laid off or is on sick leave is not necessarily an obstacle to eligibility; he may vote if he has a "reasonable expectation of reemployment within a reasonable time in the future." *Kustom Electronics, Inc. v. NLRB*, 590 F.2d 817, 821 (C.A. 10), enfg. 230 NLRB 1037. In addition, it has been held that employees who are known to be working on a temporary basis are nonetheless entitled to vote if they are employed on the critical dates and the term of their employment is "uncertain," *NLRB v. New England Lithographic Company, Inc.*, 589 F.2d 29 (C.A. 1), enfg. 233 NLRB 1013 (Court of Appeals holding it unnecessary to show that the temporary employee had a reasonable expectation of "permanent" employment). Accord, *System Auto Park & Garages, Inc.*, 248 NLRB 948, 949 ("well settled" that the test of the eligibility of part-time employees "is not based on the expectancy of permanent employment but is based on the part-time employees' relationship to the job. . . .")[10]

The same liberality has been exhibited with respect to individuals who do not work on a full-time, full-year, basis. Although the remanding opinion here implies that a dispositive distinction exists between the treatment of "seasonal" as opposed to "part-time" employees, that is not always the case. One line of decisions has authorized suffrage for employees who are hired only for a particular season and, interestingly, even though there is a strong indication that many of the seasonal employees who are allowed to vote will not be employed again.

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[10] There appears to be a certain tension between this line of cases and the one, earlier cited, affording eligibility to employees who have already turned in their notices of termination.

A good example is *California Vegetable Concentrates, Inc.*, 137 NLRB 1778 where the employer maintained a permanent complement of 240-290 employees and at the peak of its August-November processing season, hired more than 3 seasonal employees. The evidence showed that more than half of the last group of seasonals had also worked during the season in the year before that. Given this evidence of the return of many seasonals, and noting that between 20-50 seasonals became permanent employees each year, the Board concluded that the use of seasonals for 3 or 4 months each year, with many returning in a second year, "indicates the existence of a relatively stabilized demand for, and dependence on, such employees by the Employer and, likewise, a reliance on such employment by a substantial number of employees in the labor market who return to the Employer's operation each year." Based on these conclusions and "the further fact that the seasonals work with, and under the same supervision as, the permanent employees," the Board held that the seasonals shared a sufficient community of interest with the year-round employees to warrant their inclusion in the unit—this despite the facts that only the regular employees were "eligible for fringe benefits" and that the employer did not "maintain a recall list of seasonals."

Thus, in *California Vegetable Concentrates*, in accordance with precedent [11] which has been applied with consistency to the present time,[12] the Board afforded voting privileges to a group of relatively short-term employees who may have outnumbered the regular year-round workforce, despite an almost certain knowledge that, shortly after the election, many of these employees would be gone for good. Indeed, the election was scheduled, in ac-

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[11] See cases cited, 137 NLRB at 1781, n.2.

[12] E.g., *Baumer Foods, Inc.*, 190 NLRB 690; *Seneca Foods Corporation*, 248 NLRB 1119; *L & B Cooling, Inc.*, 267 NLRB No. 2.

cordance with the "usual practice," at the peak of the season, so that the largest number of employees possible would be allowed to participate. 137 NLRB at 1781.[13]

The Board has apparently chosen not to apply the *California Vegetable* "returning seasonal" test to retail store elections, but it has permitted employees who work on "an irregular basis" in such stores to vote. *Davison-Paxon Company*, 185 NLRB 21, 23, citing *The May Department Stores Company*, 175 NLRB 514, 517, and *Allied Stores of Ohio, Inc.*, 175 NLRB 966, 969. In those cases, the Board has included in the unit such employees as student, Social Security annuitants, and similar employees who work in an "on-call" status, provided that

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[13] It may be appropriate to comment upon certain cases cited by the Court of Appeals in its remand opinion here. *United Foods, Inc.*, 174 NLRB 91, was a food-processing industry case in which the Board, although citing *California Vegetable Concentrates*, did not allow the "busy season" employees to vote, without even exploring whether there was a reasonable expectation of employment of the seasonals. It would appear that, as the Board went out of its way to intimate at page 92, footnotes 4 and 5, the case may have turned on the fact that the petitioning union did not seek to represent the seasonals.

See's Candy Shops, Inc., 202 NLRB 538, involved a unit of retail candy stores which had five short peak sales periods a year. Without citing any cases, the Board excluded "as casuals [those] employees who worked only at the peaks during their periods of employment." However, the formula devised by the Board did not require any particular regularity of employment for enfranchisement, since it allowed to vote, as "regular part-time employees," all part-timers "who amassed 350 hours or more in the year preceding election, and in so doing worked in more than the peak periods. . . ." 202 NLRB at 540.

The remanding Court here also cited *NLRB v. Sandy's Stores, Inc.*, 398 F.2d 268 (C.A. 1), as standing for the principle that "employees have been held to be seasonal employees even though they worked sporadically outside the busy season." 720 F.2d at 1363, n.7. It could be said, I think, that the cited case is less concerned with seasonal employment than with an argument between the First Circuit and the Board about the definition of "regular part-time employment."

they are not "temporary," "casual," or "seasonal" employees, the only objective qualification being the undemanding one that the "on-call" employee "regularly averages 4 hours or more per week for the last quarter prior to the eligibility date." [14] In *Leaders-Nameoki, Inc.*, 237 NLRB 1269, the Board counted the ballot of a part-time sales clerk who also held a job working 50 hours per week for another employer; whose schedule with the Employer was built around her full-time job; and who could refuse to work at the times scheduled by the Employer without incurring a penalty. Applying the "regularly average 4 hours or more per week" standard, the Board counted the employee as an eligible "regular part-time sales clerk," even though she did not share in the sick pay or pension benefits available to full-time employees.

As one might anticipate, there are cases in this area which are not easily reconcilable with one another. In previous cases, affirmative conclusions as to an employee's expectation of continued employment [15] seemed to

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[14] The Board has not, to my knowledge, defined the term "regularly averages." "Regularly" suggests some sort of periodic distribution over the calendar quarter, in contrast to one block of work at a single time; "averages" seems to connote that the periodic amount of work may fluctuate. It is not clear whether the Board would consider that an employee who works a total of 16 hours on the Friday and Saturday of every fourth week during a quarter would "regularly average" 4 hours for the quarter. It is doubtful that such an employee has any less interest in employment conditions than one who works for 4 hours each Saturday morning.

It might aslo be noted that the Board holds that an "as needed" employee need not have worked for the entire calendar quarter preceding the election in order to qualify. Thus, in *Tawa Brothers, Inc.*, 246 NLRB 884, the employee was deemed eligible even though he had not been hired until the fifth week of the quarter preceding the eligibility date; it was sufficient that he averaged 4.4 hours per week in his nine weeks of work prior to the election.

[15] As indicated above, see *System Auto Park, supra*, although the cases often refer to an expectancy of continued employment, "per-

have been based upon inferences arising from either (a) the fact that the parties had agreed to and implemented a fixed work schedule, which presumably was intended be continued into the indefinite future, or (b) the fact that the parties had entered into an open-ended employment arrangement which had yielded, and might presumptively be expected to yield in the future, a qualifying amount of employment. For present purposes, the controlling legal standard is necessarily found in the Fourth Circuit's remand opinion. As earlier discussed, it appears that the Court conditioned Samuel John's eligibility upon Respondent's intention with regard to the use of John's services, i.e., was Respondent's "need for John's services . . . based on the periodic availability of work rather than on peak season demand," or was John "hired to work only on a peak season basis?" [16] It ap-

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manency" has not been accorded much significance. In *Gruber's Super Market, Inc.*, 201 NLRB 612, 613, n.5, the Administrative Law Judge, apparently with the Board's approval, wrote that high school stockboys, who "come and go" and do not enter full-time employment after graduation, are nonetheless unit employees: "The test, however, is not whether the students seek permanent employment with Respondent but whether the circumstances of their employment give them a community of interest with the other employees with respect to wages, hours, and working conditions." Accord, *Dick Kelchner Excavating Co.*, 236 NLRB 1414, 1415; see also *Mon Valley United Health Services*, 238 NLRB 916, 926; but see *Barnard College*, 204 NLRB 1134, 1135, where student employees were excluded, *inter alia*, because their employment "is only incidental to their educational objectives," and, to like effect, *Cornell University*, 202 NLRB 290, 291-92.

[16] The Court did not stress any strong reaction to the Regional Director's conclusion that, in other respects, John shared a "community of interest" with the other employees. As indicated, the Board has held that the fact that John received no fringe benefits besides wages does not preclude eligibility. *California Vegetable Concentrates, supra*; *Anne Arundel General Hospital*, 217 NLRB 848, 849; *Systems Auto Park, supra.* Joint Exhibit No. 1, described in part as a summary of "wage rates earned by bargaining unit employees," shows that three employees (perhaps including John

pears to me that the evidence clearly shows that John was not hired merely to help with the increased Christmas demand for employees.[17]

As previously set out, Respondent argued to the Court of Appeals that the principal purpose of the employment of John was to satisfy Respondent's need for extra services during the Christmas season. Respondent's brief to the Court (a public document of which I have taken notice) states, *inter alia*, "[John's] duties depended upon the seasonal nature of the Employer's business which generally required extra rackers on a regular basis only during the late fall 'Christmas rush' season. (J.A. 9). The Employer, being aware of its seasonal needs, maintained a pool of on-call employees who might be available. For this reason, the Employer called in Mr. John for the first time well in advance of the rush season, in June, 1981. (J.A. 8)." The foregoing assertions are evidently based on the affidavit of president Earl Seth, Sr., which is not in the record made before me. The Court, however,

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and perhaps not) earned $3.35 per hour, John's wage, and two others earned $3.46. The remaining employees earned between $3.82 and $12.94 per hour.

[17] There was a representation to the Court, and there is some testimony, about a particular need for John's services in the winter of 1981 due to an unusually large winter order placed by Zayre's, one of Respondent's regular customers. I see no need to dwell on this point. From the testimony and from Respondent's argument to the Court that John was hired to help out in the peak season, it is clear that, even without the unprecedented order, it is Respondent's position that John, or someone like him, would have been needed during the 1981 winter holiday season. Thus, the size of the Zayre order is relevant only to the number of hours put in by John in the winter of 1981, and not to whether he would have worked during that season. Moreover, National Poster supervisor David Sutphin testified that he "would say" that the unexpectedly sizable Zayre order came in at "the end" of October; by that time, as shown by the tabulation of John's hours earlier set out, John had already worked several substantial weeks in September and October.

obviously construed the affidavit to the same narrow effect: "Employer's affidavits . . . support the opposite finding that the need for John's services was dependent upon the Christmas peak season: (1) Employer experienced a Christmas peak season; (2) Employer maintains a pool of peak season employees; John was hired to work only on a peak season basis; . . . ." 720 F.2d at 1363.

The testimony taken at this hearing, however, casts a different light on the facts. Diane Hild, Respondent's treasurer and the daughter of president Seth, testified that Respondent continuously maintains a written list of individuals, usually about ten in number, who are available to be called in for part-time work: the list consists of women "that are on call that work in the shipping department; we have some men that are on call that would be basket watching or rackers, and then we have part time people that get to be regular part time people; they work filling in for vacations and sick leave days, and just about every day someone's out and they work wherever they're needed." Once an employee like John wades into the employee pool, "if they like the work, and they seem like they're dependable people, then you know we might call them in one day next week and one day the next week, and eventually they—then we get to our busy season, we know they, you know, can be trusted to do the work."

There are several points to make. The first is that, contrary to the evident implication of Seth's affidavit, it does not appear that John was hired in June 1981 only as a potential "racker" for use in the Christmas season. John, a very credible witness whose testimony was not denied, testified that he was first employed at the end of June, for 9 hours, to help clean some presses. On his second tour of duty, in the week ending July 24, he spent 36 hours at National Litho "assembling some broken down cartons." It was not until his third call that he came to National Posters and was put to work as a

racker, "on a press at the end of a conveyor belt receiving printed matter and stacking them there."

Second, the testimony of Hild is that there is not just one peak season, but rather two of them, the first ("pretty much . . . a two-month period of time") engendered by the Easter-Passover season, and the second resulting from the Thanksgiving and Christmas holidays (and both mostly reflecting the need of grocery stores for posters). The weekly sales records for the National Posters operation in the years 1976-1982 introduced by Respondent arguably reflect such a pattern, although it is hardly consistent year-in and year-out.

Thus, in 1976, the month with the highest average weekly sales was December ($34,000),[18] followed by November ($29,000), October ($28,000), and September ($28,000). The next two highest months were April, June, and August, with $26,000 each.

In 1977, December was again far and away the strongest month, with average weekly sales of $59,000; November averaged $50,000, October $41,000, and the remaining months $30,000-$35,000, with April and June slightly stronger at $37,000.

December lost its prominence in 1978. The last 4 months of 1978 ($69,000, $80,000, $69,000, $68,000) were stronger than the others, which ran mostly in the $50,000 range, but in that year March ($90,000) and April ($72,000) were the best two successive months.

In 1979, the first 5 months shower constant average weekly sales of around $65,000, and then June proved to be the outstanding month, with a $76,000 weekly average. October ($65,000) and December ($6,000) provided no surge, and only November suggested a seasonal rise ($72,000).

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[18] Rounded off to the next closest $1,000.

In 1980, the 1978 pattern reappeared. The low $60,000's in January and February were followed by a $90,000 weekly average month in March and $79,000 in April. May and June were also healthy ($74,000). Sales tailed off until September ($72,000) and October ($85,000), and then dropped back into the middle $60,000's in November and December.

In 1981, Respondent went from the mid-$50,000's in January and February to $70,000 in March and $73,000 in April. May and June were in the mid-60's, July and August lower, and business picked up in the next 3 months (September—$69,000, October—$73,000, November—$72,000), falling off in December to $61,000.

Thus, as of the time of John's first hiring in 1981, while this history would have showed a predictable business upturn for National Posters in one or more of the winter months, it also would have indicated a substantial probable increase in the spring, and very possibly again in June (when, presumably, employees began taking vacations), during all of which periods some reliable on-call employees might have been thought to be a necessary commodity.

The Union argues, on the basis of the weekly timecards for 1981, that Respondent in fact experienced "peak levels of full-time employment only during the months of April, June, July and October and that the employment curve was stable during the remainder of the year," and contends from this premise that the "overwhelming majority—68%—of John's employment hours were during the *non* busy months of August, September, November, and December, 1981 prior to the election on December 15, 1981." A chart of 1981 "full time hours" inserted in the Union's brief does show fewer such hours worked in March (7,005) than in January (7,663) and February (7,759), with the yearly peak reached in July (10,607), dropping off in August (6,782) and September

(7,047), rising to 8,406 in October, falling to 6,778 in November, and rebounding to 7,252 in December.

These figures show no strong correlation to the 1981 weekly sales figures for National Posters also in evidence. Those latter figures show, for example, that in July 1981, Posters experienced its lowest average weekly sales of any month in the year. There may be some question about the Union's calculations. Although unequipped to undertake a rather daunting full-scale review of all the timecards, I have made a cursory random check of a few of the subtotals found in Charging Party Exhibit No. 6 against the underlying relevant timecards upon which the "full time hours" chart is based, and in doing so have found some errors.[19]

It seems likely that at least one reason the Union's chart shows July to have been the yearly high point for "full-time" employment was that the Union counted employment in all 5 weeks ending in July; assigning most of the 1500 hours of the "pay period ending July 1" to their rightful time period—June—would have made that chart less dramatic.

Still, assuming that the Union's figures are somewhere in the ballpark, and taking into account the analysis of the National Posters 1981 weekly sales figures earlier made, it does seem that the "two-seasonal" employment is not as marked as it sounds, and that, considering the vicissitudes of business to which Respondent's brief properly refers, the work day may be too spread out and unpredictable to allow rigid characterization of the business as simply two big reasons with lulls in between. In 1979, e.g., June was the best month of the year (aver-

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[19] For example, the Union computes full-time employment for the week ending January 28 as 1,854 hours; I make it 2087 hours. The Union calculates part-time employment for the payroll period ending March 11 at 57.50 hours; I find only 35.50 hours on the cards marked "P.T." For the same period, the Union figures 1484 hours of full-time employment; my calculator says 2003.75 hours.

age weeks of $76,000), after a first 5-month period which was nearly constant at $64,000-66,000. I conclude from the evidence that the ebb and flow of business may be such as to require extra assistance at any time during the year, in addition to the two seasonal periods which may reasonbly be expected.

In a sense, it is probably true that the employment of John was related to the fact that Respondent experiences seasonal upswings and therefore desires to have a list of dependable standby employees for those periods. But the evidence also refutes the allegation that, as paraphrased by the Court of Appeals, "John was hired only on a peak season basis." While Diane Hild indicated that Respondent "hired people outside the seasons so that they would be available when the season came around," she also testified that they "always have a list of people so that someone is available. I mean there are times through the year when we do need someone off and on. . . . There are times throughout the year when we get a big job and we might need five people to pack that job at night, and we call, you know."

As noted above, in John's first two periods of work, he did not even perform any racking duties, but rather was called in because certain other jobs—cleaning presses and assembling cartons—needed to be done. Furthermore, the record of his work history, as reconstructed above, indicates that there was, between the seasons, a continuing, if intermittent, need for his services—from the beginning of his employment in the week ending July 1 until the week ending October 2, a period of 14 weeks (it would appear that the seasonal work probably started in the week ending October 30; Hild testified that the fall season "usually" starts "in the end of October"), John worked from 2¾ hours to 43¾ hours in 9 separate weeks. During his entire tenure, John worked not only at racking, assembling cartons, and cleaning presses, but ping department. Posters supervisor Sutphin testified

also worked, as both he and Hild testified, in the ship- that he was "sure" that John was called in not only because of increases in work but also because of the illness or vacation of other employees. In her description of the employees who get to be "regular part-time people," Hild said, as earlier shown,' "[T]hey work filling in for vacations and sick days, and just about every day someone's out and they work wherever they're needed." To me, that sounds, taken in conjunction with Sutphin's testimony, like a description of one of John's functions.

John's relationship with the Respondent had become, by the time of the December 15 election, something more than a transient, limited, finite thing. The continuing recalls and the testimony of supervisor Sutphin make clear that Respondent was satisfied with John's work. His name was retained on the list of 10 or so employees who were though of as a "pool" (which Hild updates perhaps twice a year "when it gets so messy you can't read it"),[20] and Hild indicated that such retention on the list gave rise on her part to a certain feeling of connection and obligation ("If I call them and they don't want to work that day, I give them two or three chances telling me that. . . ."). After the election, John said, he phoned Respondent on "many occasions" about coming to work and was told that things were slow. Supervisor Sutphin testified that Respondent has employed on-call workers after 1981 to perform the same work that John was doing in that year. Although Hild could not recall why John did not work after the beginning of 1982, she said at one point that he "was still on the on-call list" at that time, and she also agreed that if his name had

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[20] Respondent errs in stating on brief that Hild testified that her "list of available employees completely turns over each six months." When Hild was asked "how long has the longest on-call person stayed on that list that you can think of," she replied, "I don't know. Maybe 6 months. I mean, I don't know."

continued on the list, it was "possible" that he would have been "among the preferred people in the Easter season of 1982." [21]

An interesting comparison to John appears in the person of John D. Tillman, whose name was included by Respondent on the eligibility list it submitted prior to the election. The son of regular employee John Tillman, John D. was described by Hild as an individual who, beginning in 1981, "worked through the summer, filling in for vacations," and who was "not really on the on-call list" but, rather, was a "regular part-time worker."

John testified without contradiction that he and John D. Tillman often worked on the same press, sometimes alternating their duties and cleaning the press together. The timecards in evidence show that John D. first worked for Respondent for 4 hours in the week ending May 13, 1981, worked 23½ hours in the following week, did not work in the next week, and put in 16 hours in the week thereafter. In the next 16 weeks, John D. worked steadily, his weekly hours ranging from 20 to 41. However, beginning in the week ending October 2, and for the following 12 weeks (ending as of December 25, the last relevant cards in the file), John D. worked only in the week ending November 20, when he was employed for 39 hours.

Thus, at the time the Regional Director approved the Stipulation for Certification Upon Consent Election on November 10, John D. had not worked for Respondent for more than 6 weeks, and, except for the November 20 week referred to, he had done no more work as of the end of the year. While he obviously worked steadily dur-

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[21] The proceeding before me raises no issue of unlawful discrimination against John, and I therefore do not need to pass upon the suggestion that the abrupt termination of Respondent's employment of John beginning soon after the election was in any way related to an intention to depict him as a short-term and transitory employee for purposes of sustaining the challenge to his ballot.

ing the summer months, presumably as a replacement for vacationing employees, his almost totally uninterrupted absence thereafter makes it difficult to divine the theory which led Respondent to classify him, but not John, as a "regular part-time worker." [22]

I conclude that it was proper to count Samuel John's vote here. The Court's remand essentially opened for investigation the issue of whether John was hired principally to help out as a racker with the 1981 Christmas seasonal business and would not be reasonably expected to work thereafter. The answer to that question is in the negative. In fact, there is not one annual season, but rather two seasons in which John might, from year to year, participate; in fact, John was first hired as a utility worker, between the seasons, and continued to be called upon to perform various miscellaneaous duties even after he first began racking; in fact, John's name was inscribed on a list of a pool of employees upon whom Respondent hoped and intended to rely from season to season and, as well, in between.[23]

It therefore appears to me that Respondent intended to, and did, establish a relationship with John which entitled his vote to be counted on December 15, 1981. It was, clearly, an intermittent and irregular relationship, but it also held out the promise of being a continuing one, on a sustained basis during the two annual seasons and periodically between the seasons. If John D. Tillman constituted a "regular part-time employee" in the personnel lexicon of Respondent, Samuel John should

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[22] Like Samuel John, John D. Tillman received no fringe benefits and was paid the minimum wage.

[23] There is no testimony that John's name was removed from the list for any legitimate reason, and no explanation of why this apparently satisfactory employee was not recalled after January 1, 1982.

not be classified otherwise.[24] Accordingly, I conclude that the intended relationship between John and Respondent was such as to satisfy the ground rules laid down here by the remanding Court; in addition, finding John eligible to vote is in harmony with a number of the Board cases cited above and by the Court of Appeals. See *California Vegetable Concentrates, Inc., supra*, 137 NLRB 1779 (all seasonal employees allowed to vote where a pattern of return of many of them to seasonal employment exists); *See's Candy Shops, Inc., supra*, 202 NLRB 538 (employees who worked in "more than the peak periods" and who amassed 350 hours of employment in the year preceding the election "are to be considered regular part-time employees" and therefore eligible); *Davison-Paxon Company, supra*, 185 NLRB 21 (employees included who worked on an "irregular basis" in an "on-call status" if they "regularly averaged" 4 hours per week for one calendar quarter); *V.I.P. Movers, Inc.*, 232 NLRB 14, 15 (5 "on-call" moving company workers who were employed "on a frequent, though unscheduled, basis," averaging at least 5 hours per week in the quarter preceding the hearing, were "regular part-time employees" who shared the unit's community of interest, even though they received none of the fringe benefits).[25]

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[24] As indicated, Respondent argued to the Court that the unexpected Zayre order inflated John's hours in the fall of 1981. That may be so, although I note that the October-November-December sales figures for 1981 were not seriously different from those in 1980 (1980: $85,000, $65,000, $64,000; 1981: $73,000, $77,000, $61,000). But even taking the Zayre order into account, John clearly averaged more than 4 hours per week in the qualifying calendar quarter. Indeed, as noted above, in the 5 weeks in September and October prior to receipt of the Zayre order, he averaged more than 25 hours per week.

[25] In its remand, the Court of Appeals cited *Seneca Foods Corporation*, 242 NLRB 1119, a food processing industry case which applied the *California Vegetable Concentrates* approach permitting, in the appropriate circumstances indicated in the latter case, seasonable employees to vote in representation elections (although the

II. The Ballots of Amend and Souders

There remain for resolution the challenged ballots of Albert ("Pete") Amend and Wesley Souders, both of whom, the Union contends, were statutory supervisors.

"Supervisors" are not allowed to vote in Board elections, nor are they otherwise entitled to be treated as employees for purposes of the Act. Section 2(11) of the Act defines the term "supervisor" as:

> . . . any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

There are three major points which are usually made about this definition. The first, in the language of the Court of Appeals for the Sixth Circuit in *AFTRA v. Storer Broadcasting Company*, —— F.2d —— (October 5, 1984), is that "There are no bright lines controlling the determination of whether a particular position comes within the definition of 'supervisor' under the National Labor Relations Act." The second point is that the powers are listed in the disjunctive, so that the possession of any one of them is sufficient to establish supervisory status. *NLRB v. Edward G. Budd Mfg. Co.*, 169 F.2d

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Board found an insufficient pattern of reemployment in *Seneca*). The citation to *Seneca* suggested the possibility that, even though other portions of the Court's opinion seemed to impliedly distinguish between "seasonal" employees as ineligible and "part-time" employees as eligible, the Court was also authorizing an analysis which would permit John to vote on the basis of proof of a *California Vegetable* recurring-seasonal employment analysis. Such an inquiry was, however, precluded by the fact that Respondent had retained no records for years prior to 1981.

571, 576 (C.A. 6). The third is that the statute *does* conjunctively require that there be some authority vested in the employee, that its exercise require the use of independent judgment, and that the judgment be exercised in the interest of management. *NLRB v. Security Guard Service, Inc.*, 384 F.2d 143, 147 (C.A. 5).

Amend and Souders are employed at National Litho. At the time that National Posters acquired National Litho, sometime in the 1970's, there were only three press employees working at the latter shop—Amend, as the press operator; Souders, as the second pressman; and a feeder. With the acquisition of Litho, Thomas Keelan, who served as the superintendent of both Posters and Litho from his office at Posters, hired a new second pressman, moved Souders up to press operator and appointed Amend as the "foreman" of the crew. Amend was given a raise of $1 per hour and was put on a salarly-plus-overtime basis; he testified to his understanding that he was to "make sure everybody did what they were supposed to."

Amend was evidently in immediate charge of the Litho operation for several years, although, according to Souders, Keelan would usually come over to Litho from the Posters plant three or four times a week, sometimes for as much as half of the day. At some point, another press crew was hired to work at Litho during the day, making a total of around 7 daytime production employees. In addition, a night shift was instituted at Litho sometime before 1981, and Souders transferred to it in January 1981 in the capacity of "night foreman," working with three other employees. As with Amend's earlier promotion, Souders was given a raise, was put on a salary-and-overtime basis, was relieved of the requirement of punching the timeclock, and was told by Keelan, *inter alia*, to "make sure the men did their job."

It is Respondent's contention that, whether or not Amend and/or Souders enjoyed supervisory status prior

to September 1981, any such authority vanished with the elevation of one Clifford Gray to the directorship of Litho in that month. Gray had begun employment with Respondent in April 1981, working as an estimator at the Litho office.[26] Aside from the seven members of the press crews and Gray, there were at Litho two other office employees, a salesman, and a maintenance person on the day shift. In September 1981, 3 months prior to the election, Keelan was relieved of his superintendency over Litho, and president Seth told Gray that he was to be "in charge" at that location. No formal announcement was made to the Litho employees, but, Gray testified, the news got around the plant by "word of mouth."

The testimony shows that Albert Amend was, at least prior to Clifford Gray's ascendancy, a "supervisor" within the meaning of the statute. Amend estimated that, as daytime foreman, he spent (and still spends) about 30 percent of his time working at a desk in the office, checking over the quality of the product being run and performing officer tasks. The rest of the time, he works with the pressman "to make sure everything is all right"; he occasionally engages in manual labor such as unloading trucks and gathering supplies; he resolves production problems; and he meets with customers to review the posters which are in preparation (if a customer wants changes, the customer will tell Amend and he will in turn instruct the pressmen or plate maker). Amend does not actually operate the presses.[27]

Before Gray, who refers to himself as the "plant supervisor" at Litho, was put "in charge," Amend used to initial weekly the timecards of the other employees, and he made corrections on them if necessary.[28] In 1981,

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[26] Whether Gray also did estimating for Posters is not disclosed.

[27] This is also true of Souders.

[28] I have reservations about the testimonial reliability of Gray and Amend, both of whom ultimately gave the impression of hoping

when extra help was needed on Thursday nights for "New York A & P" work, Amend "would call over to

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to support Respondent's case. On the matter of initialling timecards, for example, Amend testified that he used to initial the cards of other employees each week and also made any needed corrections on them. He said that he stopped doing this in September 1981 when Gray took charge, because he noticed that Gray himself had signed a card when an employee had not punched in, and Amend "just took for granted" that he was no longer to perform that function himself. Amend said, however, that he "wasn't actually told not to do that"; but the matter was apparently left unclear enough to Amend so that, just two weeks before he testified at this hearing, Amend had gone to ask Gray whether he (Amend) should sign a card which an employee had failed to punch; Gray told Amend that he would take care of it. Contradicting Amend, Gray testified that "probably in the early part of September" in 1981, he specifically stated to both Amend and Souders, "I'll do all the initialling on the cards."

A similar conflict arose in regard to the promotion of an employee named Jacobs. Gray was asked whether he had engaged in consultations before the decision was made; his answer was, "I may have discussed it with Pete [Amend] but I made the ultimate decision." The "may" indicates an unwillingness to firmly acknowledge the fact of a discussion as to the occurrence of which his subsequent answers on the same subject leave no doubt. The gratuitous "but I made the ultimate decision," which the neutral question did not suggest, strongly bespeaks a tendentious thrust to Gray's testimony. Later, when further questioned on this subject, Gray testified that after telling Amend that he was "probably" going to promote Jacobs, Amend's reply was, as it "always" was, "You're in charge, do what you want to do." But almost immediately thereafter, Gray recalled Amend's reply differently: "He probably says, well, he's a good man, he can do the job."

Amend, on the same topic, also managed to reflect discredit upon himself by flatly contradicting Gray's testimony that such a conversation had ever occurred; in six separate questions, Amend denied that Gray had ever talked to him "about Mr. Jacobs," about Jacobs' "job performance," about Jacobs "going from a feeder to a second pressman position," or about whether Jacobs was a "satisfactory employee."

There are, moreover, other troublesome passages in the testimony which will be referred to below. My general inclination is to view the testimony of Gray and Amend with a jaundiced eye.

National Poster, and they would send the people over." [29] Amend further implied his possession of independent authority and judgment when he referred to certain part-time employees who were hired from another printing company to help out occasionally: "[t]he other three . . . [t]hat I would call in every now and then . . . I would only bring them in when we had a long run on . . . . [I would] call them directly."

In the area of more permanent hiring, there is solid evidence that Amend has in the past hired or effectively recommended the hiring of employees. In 1978 or 1979, Amend testified, Keelan asked Amend his opinion of prospective employees Davis and Silva, former co-workers of Amend's, and whether they should be hired; Amend's response was affirmative and Davis and Silvia were hired. But Amend's pretrial affidavit reflects that he played an even more central role, saying that when the company wanted to expand in early 1981, "Keelan told me to hire who I wanted. I knew two people from other jobs and since I knew they were qualified I hired them [Davis and Silvia]. . . . Before I hired them I called Keelan . . . Keelan, who also knew Silvia and Davis from the same job, said 'Well, go ahead and hire them.' "

Amend testified that he "hired" an employee named Epps, whom he had not previously known, following an interview with him. He called Keelan and secured his approval before the hiring was done.[30]

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[29] Almost immediately, Amend modified this so as to indicate that he did not usually make these calls because "most of the time Tom Keelan would know" that extras were needed, and he himself only called "once in a while"; this was further revised, a few breaths later, to "once or twice I could only say, very rarely" did he himself call for help.

[30] Amend's affidavit shows a similar course of conduct with regard to an employee named Wright. At the hearing, while Amend recalled the hiring of Epps, he could not recollect Wright. The affidavit was received in evidence without objection. Particularly

The affidavit also states that around July 1981, Amend, seeking to hire employee Jacobs as a feeder, telephoned Keelan, offered his opinion that Jacobs would be a good man, asked Keelan his thoughts, and was told, "Do whatever you want." Amend thereupon "hired" Jacobs.

The affidavit further shows, and at the hearing Amend essentially confirmed, that around the beginning of 1981, having been asked by Souders to consider an applicant named Cowan, Amend "hired Cowan after interviewing him and getting Keelan's OK."

On March 4, 1981, Amend posted a notice at the shop, signed only by him, setting out rules regarding sick leave, timecard punching, and leaving the plant without authorization; the notice warned that "non-compliance with these rules shall result in immediate dismissal." According to the affidavit and his testimony, Amend went to Keelan around August 1981 and said that Cowan, who had earlier been warned, was missing too much time. Keelan asked, "Why don't you just fire him?," and Amend did, the same day. This termination Amend testified, was pursuant to the procedure he had posted in March. According to the affidavit (which did not refresh Amend's memory to the point of recollection), Cowan returned a month later and asked for a second chance. When Amend asked Keelan about the request, the latter said that it was "up to" Amend, so he "rehired Cowan like he had never been fired." Unfortunately, Cowan had not reformed; accordingly, the affidavit states, "about 2 months later I went to Keelan and told him that I was going to have to let Cowan go. Keelan said OK and I fired Cowan."

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in view of the extent to which Amend testimonially corroborated its contents, there is no reason not to rely upon it as "proof to the extent of whatever rational persuasive power it may have." *Passaic Daily News v. NLRB*, 736 F.2d 1543, 1554, n.15 (C.A.D.C.). See also *Alvin J. Bart and Co., Inc.*, 236 NLRB 242, permitting reliance on such proof as affirmative evidence of supervisory status.

When Amend was asked about the difference in his authority pre-and post-Gray, his response was couched in the sort of frustratingly noncommittal prose that generally characterized his testimony, but it seemed nonetheless revealing. His first answer was, "Well, before when they [the employees] would come to me or I would have a problem with one of them," Amend would speak to Keelan, whereas now he talks to Gray. When then asked what sort of "problems" he had with employees that would provoke such a contract, Amend referred to "minor stuff, like one wants a raise, and one wants to work different hours than the other." When then asked how many times in 1981 the employees had so spoken to him about raises, Amend first said "three times, I guess, I really don't know," then reduced that particular kind of "problem" to zero by saying that such requests for raises were "an everyday thing." He thereupon retracted the use of the word "problem"—"I shouldn't have said that then." While there is more along this line which I will spare the reader, it does appear, I believe, that employees do even now approach Amend with "problems" relating to wages and working conditions, and that he tries to work them out with Gray.[31]

On the subject of employees leaving work early for various reasons, Amend first testified that when he has been approached by employees with such requests, which occurs perhaps once a week, he would, prior to September 1981, "grant . . . permission" to leave at that point. Since Gray took over, the employees still come to Amend, but he testified that he now asks Gray if it would be permissible for the employees to leave. On occasion, Amend testified, Gray makes a direct inquiry to the requesting employee about the circumstances. Amend's af-

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[31] Amend's affidavit states: "If an employee has a work related problem (a complaint), I would discuss it with Clifford; I make suggestions and he decides. Clifford makes his own investigation when I report a problem to him, and 'problems' are rare."

fidavit, however, gives a quite different perspective on Gray's role, at least as of January 25, 1982, when the affidavit was made:

> If someone wants to leave work early, they would come to me and I'll (1) let them go and work shorthand; (2) call some other employee in or (3) relieve the employee myself. If Gray is here (which he is most of the time), I'll tell him just to let him know what's going on.

With regard to the setting of wage scales, Amend's affidavit states that in July 1981, he and Keelan had a discussion about rates of pay in which Keelan asked his opinion about various rates and Amend gave his view of the propriety of the rates; the affidavit says, however, that Amend "didn't recommend any specific amounts to Keelan." But at trial, in explaining the nature of this discussion, Amend said, "Well, we went through prices but he determined how much it was. In other words, I may have said $8.50, and he said $9.50—you know, we were talking prices. . . ." Elsewhere in the affidavit is a reference to the scale for feeders "that Keelan and I had worked out." In speaking of employees Epps and Wright, the affidavit also states, "I pretty much decided what their pay was. . . ."

As for the scheduling of work and assignment of overtime, Amend and Gray testified that Gray handles those functions, and Amend's affidavit relates that when Gray took over in September 1981, Gray "performed several of the duties [Amend] did under Keelan," one of which was "scheduling the work and the men." [32] I note, how-

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[32] The only routine "duties" mentioned in Amend's affidavit are that Gray "takes care of all the 'prep' work," approves jobs when Amend is otherwise busy, and tells Amend when to purchase ink and how much to buy. The affidavit also states that when Gray took over, he "told Mr. Seth that I should have never been involved in hiring and firing . . . that it should have been Keelan's job. So, since September 1981, I have been removed from that area—

ever, that at one point in his testimony on cross-examination, Gray referred to the fact that Amend presently uses the office, *inter alia*, "to put down what was going to run on the second shift" and related matters. I recognize that this would not rule out the possibility that Gray tells Amend what to write.

Despite the failure of the testimony to expressly contradict Gray and Amend on the identity of the person who decides the scheduling of work and employees, the record leaves little doubt that even after Gray became the manager, Amend exercised considerable responsibility in regard to other aspects of management of the plant. Gray testified that Amend is "in charge" and responsible for "maintaining discipline" when Gray is not present. Amend testified that he is responsible for the quality of the work, and that once he signs a run sheet, it is up to the pressmen to print the product as approved by him. Amend also said that if a press breaks down on the night shift,[33] that crew will call him at home for instructions if they cannot contact Gray ("I would tell them to call Donald, who was our maintenance man . . . If he couldn't make it in, I'd call them to shut the press down. If there wasn't another job on the other process, to go start that up; if not, you could clean or grease or do whatever you had to do.") Despite his asserted second-string status in this regard, Amend testified that he nonetheless is called by the night shift on the average of twice a week.

Respondent's records indicate that as of June 25, 1981, Amend's life insurance card listed his classification as

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no one has been hired/fired since then." Amend did not testify to this suspiciously unlikely and self-serving conversation, and neither did Gray. Moreover, it appears to be in conflict with Amend's other testimony, hereafter discussed, that Gray did *not* discuss Amend's responsibilities with him when he took charge, as well with Gray's testimony to the same effect.

[33] Since April 1983, Souders' job of "night foreman" has been abolished.

"supervisor," and that Amend was receiving $10,000 in coverage. The only other company employees who were afforded that amount of coverage at the time were Posters supervisor Sutphin, Earl Seth, Jr., Diane Hild, and three other managerial persons.[34] The other employees, including Souders, all had $6,000 policies. Amend's coverage was not reduced in September 1981.

Amend and Souders both were paid weekly salaries, plus overtime after 40 hours. To the extent that the payment of overtime might be thought to imply rank-and-file status, I note that Sutphin, an acknowledged statutory supervisor, also was compensated on a salary-plus-overtime basis.

Amend testified that he was earning a salary of $13 per hour (or $520 per week) at the time Gray took over. Amend thus received compensation in excess of stipulated supervisors Earl Seth, Jr. ($450) and Sutphin ($378), and only $40 less than Gray.[35] Putting aside Souders, who evidently earned $11.70 per hour, Amend was paid over $2 per hour more than the next three highest paid bargaining unit employees ($10.80).[36] Amend's salary is evidently guaranteed; his affidavit says that he is paid "when I take a day off; I don't have to use my vacation and I don't get sick days because I'm not an hourly employee."

It seems apparent that, at least until September 1981, Amend was a "supervisor" as contemplated by Section 2(11). Clearly, he effectively recommended the hiring

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[34] Earl Seth Sr. and the office manager received in excess of $10,000 coverage.

[35] President Seth Sr. drew a salary of $500 per week, but I assume that his compensation was not necessarily limited to that figure.

[36] I note, however, that Amend and Souders were included in a general pay cut in 1981, while Gray was not. Prior to the decrease, Amend earned $567, according to his affidavit.

and firing of other permanent employees, sometimes hired employees on his own, and apparently used his independent judgment in hiring temporary employees. He established and signed a disciplinary procedure which he then applied to employee Cowan. He consulted with Keelan about fixing the level of wages and, as his insurance coverage shows, he was considered by management to be in its ranks. He exercised dynamic operational authority over both the day crews and, on frequent occasions, the night crew. I have little doubt that, at least until Gray was promoted in September 1981, Amend qualified as a-statutory supervisor.

The next question presented is whether Gray's succession to Keelan's superintendency made a material difference in Amend's status. I am not persuaded that any significant change occurred.

For one thing, both Gray and Amend testified that after Gray took charge, the latter, in his words, "never spelled out what my responsibilities were or what their's [Amend and Souders] were" (which is, arguably, not entirely consistent with Gray's other testimony that in September, he told the two that he would thenceforth "do all the initialling on the cards"). While both Gray and Amend took the general position that once Gray assumed control, Amend no decisions himself without assistance, there was inconsistency in this argument. As one point, Amend testified that with the coming of Gray, "everything was the same other than signing the [timecards]. My job is still the same. I still did what I did before." [37] The "before" range of functions thus referred to intive advice to the department head about matters recluded, as I understand the record, meaningful and effeclating to working conditions and employee hiring and tenure.

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[37] This despite his statement in the affidavit that Gray took over from him the "schedul[ing of] the work and the men."

And even though Gray and Amend attempted to persuade that Amend no longer has any effect upon such decisions, it seems very likely that the experienced Amend would play a meaningful role in such matters, a conclusion borne out, I believe, by the implications of the conflict between Amend and Gray regarding the manner in which the promotion of Jacobs was handled by the two of them. Amend's blanket denial of any such conversations leads me to believe that Gray's admitted consultation was something that Amend thought should be covered up—i.e., a true solicitation by Gray of Amend's opinion of the proposed action.

The record shows that while Gray had himself operated "small presses" in the past, he had never run a Harris four-color litho press, the sort used in the plant, which he described as a "comp'etely different press" than any he had previously run. Although the record is silent on the point, it seems very unlikely that Gray simply stopped acting as an estimator when he was appointed to succeed Keelan and that he thereafter devoted his time exclusively to the supervision of the plant which Keelan had nominally operated from afar while also heading up Posters. There is no reason to believe that by the time of the election on December 15, 1981, Amend's judgments about who to hire and who to fire, how much to pay employees, and what disciplinary procedures were in effect, would have been given any less weight by Gray, the new boy on the block, than by his predecessor.

While Amend testified that he had had no "input" into layoffs which have occurred since September 1981, it later developed that he was speaking of only one such layoff, of three employees who "had nothing to do with the presses." It is also true that Amend testified that since Gray took over, he has "hired employees" without coming to Amend to ask whether he believed the prospec-

tive employee "would be a good man." There is no evidence, however, that such post-1981 employees were involved in pressroom work, and it may be that, as with the layoffs just noted, any such employee "had nothing to do with the presses."

Even if I were to put aside the reasonable inference that in such areas as hiring and discharge, Amend's influence did not abate once Gray came into authority, it seems to me that certain of the evidence nonetheless confirms Amend's continued supervisory status after Gray's ascendancy. As pointed out above, Amend testified that he is even now called at home on the average of twice a week to handle problems on the night shift, and his discretionary handling of these problems sounds very much as if he possesses the statutory authority "responsibly to direct" and "assign" the employees ("I would tell them to shut the press down. If there wasn't another job on the other press, to go start that up; if not, you could clean or grease or do whatever you had to"). Moreover, when asked who was in charge of the pressroom when he was gone, Gray said that Amend was in charge and that he "suppose[d]" Amend "would have . . . the same responsibility that [Gray] did when [Gray was] there."

Similar independence of authority appears in Amend's affidavit earlier quoted: "If someone wants to leave work early, they would come to me and I'll (1) let them go and work shorthanded; (2) call some other employee in or (3) relieve the employee myself. If Gray is here (which he is most of the time), I'll tell him just to let him know what's going on." "I'll . . . let them go" implies the power to make that decision. The determination to "call some other employee in" (telling Gray so as "just to let him know what's going on") indicates the power to hire, at least temporarily.

Even though Amend eventually retreated from this testimony, his statement that he talks to Gray when

"employees would come to me or I would have a problem with them" further suggests (1) that employees regard Amend as a channel for resolving disputes and (2) that Amend has "problems" with employees which he treats in a managerial fashion. Furthermore, Gray effectively conceded that he looks to Amend in making at least some personnel decisions by his concession that he "consulted" with Amend about the promotion of Jacobs. Gray's testimony (at one point) that Amend "probably" said that Jacobs was "a good man, he can do the job" strongly implies that Amend was not simply announcing his decision but, rather, was soliciting Amend's opinion of the proposed promotion.

Then again, we should no forget Amend's testimony that "everything was the same" (except for the signing of timecards) after Gray was elevated; the strong indication that the bulk of Amend's daily work (including direct consultation with customers) is managerial in character; the reflection of Amend's disciplinary authority evinced by the March 1981 disciplinary procedure which he alone signed and which, he testified, he did not "remember taking . . . down" and, as far as he knew, "might still be" posted; the substantial salary he received in 1981, more than that paid to other conceded supervisors; and his insurance coverage at a rate equal to most of the other supervisors. Having taken all the foregoing factors into consideration, it is my opinion that Amend was a "supervisor" as contemplated by Section 2(11) on December 15, 1981, and that the challenge to his ballot should be sustained.[38]

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[38] The thousands of decisions rendered by the Board over the years on the subject of supervisory status run the gamut of possible legal and factual analysis. *Sayers Printing Company,* 185 NLRB 840, cited by the Union, and *Hydro Conduit Corporation,* 254 NLRB 433, relied on by the Respondent, perhaps represent both extremes of the spectrum. I have little doubt that the Board panel which decided *Sayers* would find Amend to be a supervisor. I am less certain that the panel majority in *Hydro Conduit* would

I reach a different conclusion with respect to Wesley Souders' eligibility to vote, although the question is not open-and-shut. As set out above, when Souders was transferred in January 1981 to the newly-established night shift along with three other employees, he was called a "foreman," given a raise, put on salary-and-overtime, relieved of punching the timeclock, and told to "make sure the men do their job." Souders testified that, at night, he spent about half of his time in the office perusing the press sheets for accuracy. Like Amend, he performed miscellaneous labor, sometimes spoke to customers, and did not operate the press.

Although Souders obviously possessed authority on the night shift, I perceive no statutory hook here on which the Union can hang its hat. There is no showing that Souders was vested with any of the powers listed in Section 2(11) or that he could effectively recommend their exercise. There are, I should note, Gray's testimony that Souders was "responsible for maintaining discipline" on the night shift and Souders' aforesaid testimony that he was told in January 1981 to "make sure the men do their job." It could be argued, especially considering that Souders was the highest-ranking employee consistently present at night, that he must indeed have possessed some sort of disciplinary authority over the other three employees. However, the "responsible for maintaining discipline" language is rather vague and was not explored; it could mean nothing more than that Souders would have been the one to contact Amend or Gray if something untoward occurred at night. Given the evidence of the frequent contacts made by the night shift with Gray and Amend, one senses that that is how any dis-

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reach the same conclusion, although it does seem to me that Amend has been vested with some independent authority here which was not true of the disputed employee in *Hydro Conduit*.

ciplinary problems would probably have been handled except, perhaps, in an emergency.[39]

In my judgment, the evidence does not show that, in December 1981, Souders possessed any of the statutory attributes of a supervisor; rather, he was probably at best a leadman or working foreman who did not purport to act in the interest of Respondent in the sense that the Act envisions. I recommend, therefore, that the challenge to Souders' ballot be overruled.

On the basis of the foregoing findings of fact and conclusions of law, I recommend that the Board reaffirm its original Order in this case. Depending upon the ultimate disposition of my conclusions upon review, should review be sought, the ballots of Amend and/or Souders may have to be opened and counted, but I see no need to describe all possible scenarios at this point.

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[39] As set out above, in June 1981, while Souders was serving as "night foreman," Respondent provided him with only $6,000 worth of life insurance coverage. Hild had originally filled out Souders' card to show him as a "pressman," but her father told her to classify him as a "supervisor." Nonetheless, he received only the insurance coverage given to all the rank-and-file employees.

Why the job of "night foreman" was abolished in April 1983 is something of a mystery. Souders explained that the Company "felt there was no need for a night foreman because Pete [Amend] would have to hang over [sic] or Clifford would—you know—come back if there were jobs that had to be okayed or—.," The record is silent as to whether a salary reduction for Souders accompanied the abolition of the position. If there was none, it would be hard to think of any business jurisdiction for the action except to somehow influence this proceeding. If, however, a financial saving was involved, the change could arguably indicate that no true supervision was required on the night shift.

SUPPLEMENTAL ORDER [40]

The Order issued by the Board in the earlier proceeding in this case (265 NLRB No. 115) is hereby reaffirmed.

Dated, Washington, D.C. November 23, 1984.

/s/ Bernard Ries
BERNARD RIES
Administrative Law Judge

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[40] In the event no exceptions are filed as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

289 NLRB No. 58

D—7050
Baltimore, MD

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 5—CA—14585

NATIONAL POSTERS, INC. AND NATIONAL LITHO,
A DIVISION OF NATIONAL POSTERS, INC.

and

BALTIMORE GRAPHIC COMMUNICATIONS UNION,
LOCAL NO. 61-C

SUPPLEMENTAL DECISION AND ORDER

On February 11, 1988, Administraitve Law Judge Bernard Ries issued the attached second supplemental decision. The Respondent filed exceptions, a brief in support of exceptions, and a motion to reopen the record or, in the alternaitve, for reconsideration,[1] and the General

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[1] In its prior decision and order remanding this case for further hearing (282 NLRB No. 148 (Feb. 4, 1987)), the Board, inter alia, found no merit to the Respondent's contention that the high turnover rate among its employees since the last election required the holding of a new election. In its motion, the Respondent seeks to have the record reopened so that it could introduce into evidence an affidavit from its vice president, Diane Hild, describing the additional turnover and changes that have occurred since the Board's prior decision and, alternatively, requests that the Board reconsider its prior ruling that the "turnover" argument lacked merit. The Respondent's motion, having been duly considered, is denied as lacking in merit and raising matters previously considered by the Board.

Counsel filed a brief in answer to the Respondent's exceptions and its motion. The Charging Party also filed a brief opposing the Respondent's motion.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.[3]

ORDER

The National Labor Relations Board orders that the Respondent, National Posters, Inc. and National Litho, A Division of National Posters, Inc., Baltimore, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Baltimore Graphic Communications Union, Local No. 61-C as the exclusive bargaining representative of its employees in the following appropriate unit:

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[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In his recommended Order, the judge directs that the Board's Order in the original proceeding in this case (265 NLRB No. 115, dated December 10, 1982) he reissued. We agree. As the Board's Order and notice in that proceeding were not published, we shall reissue the Order and notice in full here, modified only to reflect the Charging Party's correct name.

All production and maintenance employees including truck drivers, employed by the Employer at its 800 Debelius Avenue and 4206 Shannon Drive, Baltimore, Maryland locations; but excluding all office clerical employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the above-named labor organization as the exclusive representative of all employees in the above-named appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Post at its facilities at 800 Debelius Avenue and 4206 Shannon Drive, Baltimore, Maryland, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediatly upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. June 30, 1988

JAMES M. STEPHENS,
Chairman

MARSHALL B. BABSON,
Member

MARY MILLER CRACRAFT,
Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX D-7050

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Baltimore Graphic Communications Union, Local No. 61-C as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees including truck drivers, employed by the Employer at its 800 Debelius Avenue and 4206 Shannon Drive, Baltimore, Maryland locations; but excluding all office clerical employees, guards and supervisors as defined in the Act.

NATIONAL POSTERS, INC. AND
NATIONAL LITHO, A DIVISION
OF NATIONAL POSTERS, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions cocerning this notice or compliance with its provisions may be directed to the Board's Office, Candler Building, 109 Market Place, Suite 4200, Baltimore, Maryland 21202, Telephone 301—962—2772.

JD—21—88
Baltimore, MD

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case No. 5-CA-14585

NATIONAL POSTERS, INC. AND NATIONAL LITHO,
A DIVISION OF NATIONAL POSTERS, INC.

and

BALTIMORE GRAPHIC COMMUNICATIONS UNION,
LOCAL NO. 61-C [1]

Eric M. Fine, Esq., of Baltimore, Maryland, for the General Counsel.

Sandra J. Hughes, Esq. (Delson & Gordon), of Washington, DC, for the Charging Party.

Maurice Baskin, Esq. (Venable, Baetjer, Howard & Civiletti), of Washington, DC, for the Respondent.

SECOND SUPPLEMENTL DECISION [2]

Bernard Ries, Administrative Law Judge: On 15 December 1981, a representation election was conducted by

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[1] In his brief, counsel for General Counsel has requested that the name of the Charging Party be amended in the caption to reflect its present correct title. The motion is granted.

[2] In fn. 2 of its "Decision and Order Remanding For Further Hearing," 282 NLRB No. 148, the Board pointed out that I should not have entitled my first decision in this case as a "Supplemental Decision," since "there had been no prior judge's decision written

Region 5 among the approximately 53 eligible voters at Respondent's two plants in Baltimore, Maryland. The tally of ballots showed that 24 employees voted in favor of the Charging Party here, 21 unfavorable votes were cast, and 4 ballots were challenged.

Without holding a hearing, the Regional Director for Region 5 ruled, *inter alia*, that the ballot cast by employee Samuel John and another ballot should be opened and counted. Further action on the remaining two challenges was deferred pending the results of the revised tally. The Board adopted the proposed procedure.

The two ballots weer opened and the revised tally showed the Union ahead by 25-22. The Regional Director issued a Certification of Representative to the Union, and the Respondent refused to bargain in order to test the validity of the certification. The Region issued a complaint asserting the Respondent's refusal to bargain to be unlawful.

On 10 December 1982, the Board issued a Decision and Order in which it granted General Counsel's motion for summary judgment and held that Respondent was violating Section 8(a)(5) of the Act by refusing to bargain with the Union. 265 NLRB No. 115 (not reported in published Board volumes).

On 3 November 1983, the United States Court of Appeals for the Fourth Circuit held, contrary to the Board, that a hearing was required on the issue of Samuel John's eligibility to vote. 720 F.2d 1358. Accordingly,

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in this case." Despite the fact that the Board's first Decision and Order in the case (265 NLRB No. 115) might arguably have made *my* first decision on remand a "Supplemental Decision," the Board's comment is, of course, authoritative. Since there has now been a "prior judge's decision," I suppose that this one would properly be headed "Supplemental Decision," and, indeed, the Board's remanding order directs the preparation of a "supplemental decision." To avoid confusion, however, I have entitled this decision as shown above.

by order dated 6 April 1984, the Board directed that a hearing be held to detemine the status of employees Samuel John, Albert Amend, and Wesley Souders. The right of alleged supervisors Amend and Souders to vote had not previously been resolved because once the revised tally had issued in June 1982, the Union had enjoyed a lead of 25-22, thus making immaterial the votes of Amend and Souders. In directing the hearing, the Board recognized that the disposition of John's vote could make determinative the ballots of Amend and Souders.

A hearing on the eligibility of John, Amend, and Souders was held before the undersigned in June 1984. On 23 November 1984, I issued a decision recommending that the ballots of John and Souders be counted, but that Amend should be disqualified from voting as a statutory supervisor. Because John's ballot had already been counted, and the Union was ahead by 25-22, I further recommended that the Board's original bargaining order be reaffirmed.

Appeals from my recommendations were filed with the Board. In addition, on 27 December 1984, Respondent filed a motion to reopen the record for two purposes. One objective was to submit evidence of substantial employee turnover since the election; a supporting affidavit was attached. The other was to "present evidence that the Petitioner no longer exists, or has undergone fundamental change without due process participation by Respondent's employees. . . ."

In support of the second contention, Respondent attached reprints of reports in labor newsletters, dated 5 April 1983 and 10 June 1983, regarding the merger of Charging Party's parent organization with another international labor organization effective 1 July 1983, as well as copies of certain pages from what purported to be Charging Party's "former by-laws." Respondent explained that the evidence "was not adduced previously, in part because some of the necessary evidence was not

known by the Respondent until recently,[3] and also because the evidence was not relevant to any issues in this case until now. The Board's previous Order Directing Hearing . . . did not authorize the Administrative Law Judge to consider any issue other than the voting eligibility of the three challenged employees. . . . The evidence sought to be adduced in this motion, therefore, which previously might have been premature if presented to the Judge is now extremely relevant to the resolution of the case."

On 4 February 1987, the Board issued a "Decision And Order Remanding For Further Hearing" (282 NLRB No. 148). While the Board affirmed my rulings, findings, and conclusions, it also decided to reopen the record to determine whether the 1983 merger had "so substantially changed Local #61 as to raise a question concerning its continued status as the certified bargaining representative of the Respondent's unit employees." A hearing for the mandated purpose was held on 29 July 1987.

Briefs were filed by General Counsel and Respondent on 25 September 1987. I have reviewed the transcript proceedings,[4] the exhibits, and the briefs, and I recom-

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[3] Presumably the material contained in the affidavit relating to turnover.

[4] I hereby correct certain transcript errors, which do not affect issues of substance, in order to clarify the record:

Page	Line	Change	To
4	19	heard and	erred in
24	1	At PGCU	IPGCU
32	3	caberman	cameraman
39	17	chapter	chapel
48	24	were	were not
52	7	not	now
83	1	MORNING	AFTERNOON
102	16	through	for
103	9	according to disclosuring	reporting and disclosure act.

mend that the Board conclude that the merger did not substantially affect the identity or continuity of the Charging Party as collective-bargaining representative of Respondent's employees.

I. The Basic Facts

The Charging Party, formerly known as Baltimore Printing Pressmen and Assistants' Union No. 61, was for many years a local of the International Printing and Graphic Communications Union, AFL-CIO, CLS (hereinafter "IPGCU"). After some period of discussion, IPGCU and another international, Graphic Arts International Union, AFL-CIO, CLC (hereafter "GAIU"), decided to merge into an organization called Graphic Communications International Union ("GCIU").

The merger referendum was held in April 1983. Of an active IPGCU membership of 91,000, affiliated in about 540 locals, more than 49,000 members voted in favor of the merger and over 13,000 against. Active members of GAIU (which had on its rolls at the time some 76,000 members in 200 locals) similarly approved the merger by more than a 4-1 majority. The effective date of the merger was 1 July 1983.

In approving the merger, the members adopted three basic documents—an "Agreement For Merger," an "Implementation Agreement," and a Constitution. These documents provided for a "transition period" of nine years, in recognition of a perceived "need to smoothly and effi-

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Page	Line	Change	To
123	20	vesture	vestige
124	4	employers	employees
135	16	accurate askewed	inaccurate skewed
138	14	all fiscal	Saul Fishko
158	21	takeoff	takeover
174	18	introvertedly	inadvertently
175	7	commendations	accommodations
175	22	MR. BASKIN	MS. HUGHES

ciently integrate the policies, programs, officer structure, staff and personnel of the two merging internationals." (Agreement For Merger, GC Ex. 34, p. 2, section 4.) During this period, various temporary provisions put into effect at the commencement of the merger would gradually be phased out by 1992.

II. The Basic Legal Principles

In *NLRB v. Financial Institution Employees*, 106 S. Ct. 1007, the Supreme Court rejected the Board's holding that all employees, including nonmembers of the union, should have been given an opportunity to vote in an election in which an independent union decided whether to affiliate with an international union. In its opinion, the Court also noted a second Board rule which came into play when changes occur in a union's organizational structure. If such changes are, in the Court's words, "sufficiently dramatic to alter the union's identity," a "question of representation" will arise, authorizing an employer to lawfully refuse to deal with the affected entity until the Board has conducted a representation election. Such a representation question may arise, said the Court, when the changed circumstances make it "unclear whether a majority of employees continue to support the reorganized union." *Id.* at 1013.[5]

By this standard, the Court appeared to be adopting an underlying approach akin to that applied by the Board and the courts in determining whether a new employer is in law a successor employer, i.e., can it be concluded that employment conditions are sufficiently similar so as to raise the inference that employees would, as in the past, still desire representation by the incumbent union? *United Maintenance and Manufacturing Co.*, 214 NLRB

[5] See also *id.* at 1015: "We repeat, dissatisfaction with the decisions union members make may be tested by a Board-conducted representation election only if it is unclear whether the reorganized union retain majority support."

529, 532; *Ranch-Way, Inc.*, 183 NLRB 1168, 1169; *NLRB v. Albert Armato*, 199 F.2d 800, 803 (C.A. 7).

The conceivable organizational and structural modifications of labor organizations are manifold. The reorganizations which, on their surface, present perhaps the most likely prospect that a change of identity has occurred are affiliates of independent unions with national unions and mergers of two local unions. Less superficially compelling, perhaps, is such restructuring as the change of affiliation by a local union from one parent national union; in such cases, the local has previously to a superior authority, and its members have presumsurrendered some control over its own shape and destiny union to another, or a merger of a parent with another ably contented themselves with the knowledge that changes affecting them might be wrought by the superior entity without their consent.

In making assessments of bargaining representative "continuity," however, the Board has not expressly created presumptions about the particular nature of the modification, but rather has generally examined each case to determine the effect of the changes, if any, upon the essential identity of the bargaining representative. "[S]tructure, administration, officers, assets, membership, autonomy, by-laws, size, and territorial jurisdiction," *NLRB v. Pearl Bookbinding Co.*, 517 F.2d 1108, 1111-12 (C.A. 1), have all come under scrutiny; while none of these factors has been denominated as critical or dispositive, it is obvious that some are of more significance than others.[6] The burden of demonstrating a change in identity has been allocated to the party mak-

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[6] *Pearl Bookbinding* involved the 1972 merger of the International Brotherhood of Bookbinders and the Lithographers and Photoengravers International Union, which produced the Graphic Arts International Union. That Union, as set out above, merged with the IPGCU in 1983. IPGCU was itself the product of an earlier merger.

ing the claim, even when the forum is an unfair labor practice proceeding. *Insulfab Plastics, Inc.*, 274 NLRB 817, 821, enfd. 789 F.2d 961 (C.A. 1).

III. An Examination of The Pertinent Factors

Local 61-C experienced very little immediate change in its structure and operations as a result of the 1 July 1983 merger of its parent union with GAIU. Virtually all of the elected officers of Local 61 as of January 1983 remained incumbent in January 1984, and in fact most were still serving at the time of the hearing in 1987. The bypass of Local 61-C were changed (by adoption at a membership meeting) in only a few respects subsequent to the merger: the oath of office was, although not required, amended to conform to the new GCIU Constitution; the oath of membership, which *is* Constitutionally mandated, was adopted, but had no apparent substantive effect upon the obligation of membership when compared with hte former Local 61 oath; the jurisdictional and "Form of Organization" clauses of the Local's by-laws were broadened slightly, but not to the full extent of the scope of such clauses in the new GCIU Constitution;[7] and the appropriate name changes were made throughout the Local by-laws.

After 1 July 1983, Local 61-C continued to increase dues periodically, following the same procedure it had employed prior to the merger.[8] All increases have been

[7] The record raises a question whether these changes even became effective. See Resp. Exh. 100, letter of International Recording and Financial Secretary Norton to Local 61-C President Brown, dated 2 February 1984.

[8] Respondent's brief, which states that the Local's dues "increased by $2.00 per journeyman over those of former Local 61 in the year following the merger," does not quite comport with the record. Eight journeyman classifications had dues increases of $2.00; one was increased by $1.50, two by $1.00, and one had no increase. The record also shows a $2.00 across-the-board increase

occasioned by revenue needs, according to the testimony of long-time Local 61-C President and business agent Brown, and had no connection with the merger. The new GCIU constitution does not contain any provision prescribing standards which local unions must apply in formulating dues.

The merged Constitution essentially carries forward the *per capita* taxes paid by the former IPGCU locals to the International prior to the merger. A provision in the merger agreement specifies that while a *per capita* structure which will apply to all GCIU members is contemplated, "there will be no change in Per Capita payments as a result of merger, and the matter of changes in the Per Capital structure need not and will not be considered as an issue at the 1984 Convention and can only be modified thereafter by Convention action or referendum of the entire membership of the GCIU." G.C. Ex. 34, Merger Agreement, p. 3, item 7. Brown testified without controversion that, as of 1987, there have been no changes in *per capita* taxes paid to the GCIU by Local 61-C.

At least up to the end of 1986, the last information of record on the subject, there is no evidence that Local 61-C has suffered financially from the merger. For the year ending 31 December 1982, annual net revenues equaled $963 and members' equity was $17,668; as of 31 December 1986, the net revenue amounted to $2,726, and members' equity was $21,111.

Local 61-C has a membership of about 190, and represents (both prior to and since the merger) employees in three bargaining units in Baltimore; the largest unit comprises those employees employed by an association called Printing Industries of Maryland. President Brown has been the chief negotiator for all three contracts since

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(except for the "specialty" classification) in January 1982; a $1.00 general increase (with the same exception) in January 1983; and $1.00 general increases in April 1985 and January 1986.

1972. For the Printing Industries contract negotiated in 1982, he appointed to his negotiating team IPGCU members Kaplan and Hosza; in 1984, he appointed Kaplan and Local 61C Vice President Edwards; and in 1986, he selected Local Officer Spies and chapel chairman Berry.

In 1984, after 6 and 8 fruitless bargaining sessions, Brown asked Robert Callahan, a former IPGCU and then GCIU International Representative, to assist in the Printing Industries negotiations. Callahan attended the last two meetings. In 1986, lack of progress again led Brown to call Callahan to the negotiations; the latter appeared for one day, and he was supplanted, also for one day, by James Mitchell, a one-time IPGCU Vice President then serving as GCIU Vice President. Brown testified that, around 1973, he had also sought the assistance of IPGCU International Officers for such a purpose.[9]

The new GCIU Constitution provides that if a Local believes that it might have to strike, a membership vote for strike sanction is presented to the GCIU Secretary-Treasurer, who then asks the International's General Board for approval. Such approval is only preliminary, however; it is thereafter up to the International President to make the final decision about approving an actual strike, and subsequently there must be authorization of the strike by a two-thirds vote of members in the affected unit as well as approval by the local union as a whole. G.C. Ex. 34, pp. 51-52, Chapter XIIIA.

Similar restrictions also applied, however, under the IPGCU Constitution, although the procedure differed: the Board of Directors of the IPGCU was empowered to finally decide whether a strike was authorized (but the

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[9] The negotiating team for the American Bank Stationery unit in 1982 was Brown, chapel chairman Cirri, and pressman Daniels; and in 1984 and 1986, Brown and Daniels. Brown has been the sole negotiator for the AFSCME unit, consisting of one employee.

local then was required to secure a two-thirds approval from the entire membership, rather than just the unit involved). G.C. Ex. 33, pp. 59-60. Thus, both before and after the merger, Respondent's bargaining unit employees were powerless to decide for themselves whether or not strike.[10]

With respect to the approval of collective-bargaining agreements, Brown testified that both before and after the merger, once the membership had ratified a contract, "we usually send a copy of that, at that time, for the International's approval." [11] But he went on to state his belief that "[i]t is still a contract on the local level, whether the International approves or not, actually," and that an agreement signed by a local and an employer is, without more, a "legal and binding" contract.

The new Constitution provides, in a section entitled "Collective Bargaining," Part 2, Chapter XIII, Ch. 13.2, that "All collective bargaining contracts shall be *subject*

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[10] On brief, in an effort to show that the GCIU "established greater authority over the local after the merger and permitted less local autonomy than had the IPGCU," Respondent erects a strawman and then flails away at it. At pp. 12-13 of its brief, Respondent asserts that "whereas the IPGCU had not disapproved one of Local 61's requests for strike sanctions in recent memory, the GCIU leadership has disapproved one of two such requests submitted by Local 61-C since the merger. (Tr. 26)." At brief, p. 18, n.8, Respondent refers to this as "increased review and disapproval of local requests for strike sanctions." At p. 21, Respondent states that "whereas the IPGCU had never disapproved a Local 61 request for sanctions, the GCIU disapproved such a request immediately following the merger." These assertions overlook Brown's further testimony, on the same transcript page cited by Respondent, that the sanction was disapproved "on procedural grounds" because Local 61-C had "asked for strike sanction before it was voted by the membership," and, at Tr. 27, that once the procedural defect was corrected, the sanction was granted.

[11] Subsequently, he testified that he "think[s]" the Local has always submitted a copy to the International since the merger, and that he "always" did prior to the merger.

to approval by the International President" (emphasis added). General Counsel argues that the sentence does not require that every contract must be submitted for approval, and "it does not state that the contract is rendered nugatory if the International President does not approve it." Support for this contention may be found in the argument that a clearly mandatory provision could easily have been written: e.g., "All collective-bargaining agreements must be approved by the International President." That the drafters were capable of such clarity is found in the immediately following provision (Ch. 13.3): "No agreement shall be entered into with any employer who has establishments within the jurisdiction of more than one Local Union *without consultation* with the International President" (emphasis added). Not only is this prohibition more plainly mandatory, but its substance implies that locals may, in other situations than the one cited, "enter into" agreements which are immediately effective.

Respondent, in arguing on brief that, prior to the merger, Local 61-C "was completely subordinate to and controlled by the International," asserts, *inter alia*, that IPGCU "approved or disapproved local collective bargaining agreements ([G.C. Ex. 33], Art. XIII, §§ 1-3)." The cited provisions, under the heading "Contracts And Agreements," read:

> Section 1. No subordinate union or member thereof or any person shall enter into negotiations in the name or on behalf of the International Union for the purpose of making any contract or agreement with any organization, corporation, association, firm or individual, which may, in any manner, affect the interests of the International Union, or of any subordinate union thereof, or of any person affiliated therewith, without having been first authorized by the Board of Directors.

> Section 2. When negotiations involving [sic] the formulation of an agreement or contract which may effect [sic] the interest of the International Union, the subordinate union or person desiring to enter into such negotiations shall submit to each member of the Board of Directors a complete statement of all the facts pertaining thereto. Each member of the Board shall, thereupon, without delay, examine the same and forward his decision thereon to the President. The President shall notify such subordinate union or person of the decision of the Board of Directors.
>
> Section 3. No member or subordinate union shall act as an agent for or on behalf of the International Union without specific prior written authorization of the Board of Directors.

Assuming that the foregoing applies to bargaining agreements in the first place, a literal reading of this language would have only prohibited a local from "enter-[ing] into negotiations" without authorization from the former IPGCU Board. While, as noted, Respondent concedes that the IPGCU Constitution vested in the Board a right of approval or disapproval of bargaining agreements, a broad reading of the language is needed to reach that conclusion. On the other hand, if the provisions should be construed to mean that the IPGCU Board had to preliminarily approved the main themes of bargaining proposals, it could arguably be termed retention of the right of approval.

Section 4 of the same Article clearly seems to have assumed local autonomy in negotiating agreements:

> Joint Local Agreements
>
> Section 4. Where there are two or more subordinate unions in any jurisdiction in the book and job branch or in the newspaper branch of the busi-

> ness, no local contract or agreement shall be entered into without every effort being made for all such subordinate unions to join them.

But whatever inferences the reader may choose to draw about IPGCU's right of approval from the foregoing provisions, the remainder of the old Constitution indicates that IPGCU did, in several respects, limit the authority of locals to agree to certain terms of employment. See, e.g., G.C. Ex. 33, pp. 58, 134-137 (all local wage agreements shall not exceed a three-year duration unless waived by the President; no contract shall require or permit any member to work in excess of 7½ hours per day or 5 days in a week; no regular shifts shall exceed the established number of hours constituting a day's or night's work; and similar requirements).

There is considerable ambiguity in the record on this topic; I shall return to it later.

It appears that the grievance procedures between Local 61-C and its related employers have remained the same since the merger. Brown testified that the only arbitration in which the Union has been involved in the last 20 years was handled by International Representative Callahan; but he was "[n]ot real sure whether it was before or after the merger." [12] Brown asked Callahan to represent the Local because he himself had never handled an arbitration.

In size of membership, the merger has had no discernible effect upon Local 61-C. Respondent states on brief:

> [O]fficials of Local 61-C have discussed the possibility of merging with at least one other GCIU local in the Baltimore area. (Tr. 61). Such mergers are

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[12] Despite this testimony, Respondent states on brief that "[t]he GCIU . . . has handled the only arbitration which Local 61-C has had under its collective bargaining agreements."

being encouraged by the International (G.C. Ex. 34), and additional mergers can be expected to occur in the Baltimore area during the "transition period." (Tr. 68-73).

The first sentence is accurate so far as it goes. Brown testified that he had talked about merger at some unstated time to one of the officers of Local 41-S (with which Local 61-C was sharing offices), but got no "feedback" from the other officers of 41-S to whom he had sent materials on the subject. The matter was "just dropped." [13] The first clause of the second sentence is also accurate, but could use some amplification: the merger agreement states that Locals will be encouraged to merge, but, "in recognition of the principle of Local autonomy and self-government, such mergers will not be compelled."

The final clause, however, can only represent Respondent's personal sentiment because it does not reflect Brown's testimony at the pages cited (or anywhere else). The closest Brown came to the notion of "mergers can be expected to occur in the Baltimore area" was the somewhat less affirmative "Anything is possible." There is no basis for this speculation so far as Local 61-C is concerned or, for that matter, any other Baltimore local.

Respondent contends on brief that the "trial and appeal procedure for IPGCU members has been entirely revamped under the GCIU Constitution (G.C. Ex. 34, Art. XXI)." While the relevant provisions have been changed, it does not appear to me that, insofar as they affect members of Local 61-C, any significant substantive changes have been made.

There are some differences in approach. The new Constitution expands the due process rights of the charged

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[13] In addition to 61-C and 41-S, there are two other GCIU locals in Baltimore. Brown testified that "[t]ere is very little in competition with each other."

member by, in effect, requiring two pretrial investigations, one by the local executive board and one by the membership. It also makes final a trial board's finding of innocent. Under the old system, a member could be expelled only by a two-thirds membership vote, but now a majority is sufficient. On a finding of guilty, the local membership has now lost the authority to increase the penalty recommended by the trial board. The channels of appeal at the national level have decreased from the three to two.

The modifications of the former IPGCU Constitution trial and appeal procedure do not seem sufficiently radical as to render Local 61-C a new and different local; nor are they the kind of changed circumstances which would appear to bring into play the Supreme Court's standard (*NLRB v. Financial Institution Employees, supra*) of whether the reorganization makes it "unclear whether a majority of employees continue to support the reorganized union."

The Respondent also asserts that "[t]he new GCIU General Board has new authority to receive charges directly without prior local rulings . . . ([G.C. Ex. 34], Art. XXI, § 7)." The reference is probably to Section 2 of Article XXI, which apparently contemplates that certain charges can be filed with the General Board (while the provision is not very clear, presumably those charges which may be "brought" by the General Board—"Against an Officer or Other Official of a Local," "Against a Local," and "Against a Grouping"—are the ones which should also "be filed with . . . the General Board.)" Although the IPGCU Constitution contained no comprehensive provision relating to charges received and acted upon by its governing Board of Directors, that Constitution made references to action taken by the Board which would undoubtedly have been Board-initiated (e.g., G.C. Ex. 33, p. 29, Art. V, Section 3: Board has "power to suspend or revoke the charter of a subordinate union, or confer-

ence, or council, or to suspend or cancel the cards of members thereof for violations of the laws of the International Union"; p. 40, Art. VI, Section 16: subordinate unions failing to honor a traveler's card "shall be subject to a fine of $50 in the first instance and shall be subject to suspension by the Board of Directors in the second instance . . ."; pp. 59-60, Art. XIV, Section 1: any local failing to obtain strike sanction "may be disciplined by fine, suspension, or the revocation of its charter, as the Board of Directors may determine.") Manifestly, some level higher than the local one *had* to be authorized to entertain certain kinds of charges; in this respect, the new Constitution is not materially different from the one which governed the old IPGCU.

Respondent's brief stresses the changes wrought by the merger at the national level. The merger agreement provides that "there will be a need for all of the Officers of the two organizations during the early years of merger, but that ultimately, the number of positions can and shall be reduced." It goes on to mandate that, as the "first officers" of the GCIU, the incumbent President of the GAIU would become President of the new Union; the President of the IPGCU would become "President Emeritus," an essentially advisory position, of the GCIU; the IPGCU Secretary-Treasurer would occupy the same position in the merged organization; the GAIU Secretary-Treasurer would fill the office of GCIU Recording and Financial Secretary; the GAIU Executive Vice President would hold that office with the GCIU (but the office would be eliminated for the term beginning 4 June 1984; however, in 1988, the office of Recording Secretary would become Executive Vice-President); and, of the 15 Vice-Presidents, eight of them would be incumbent IPGCU Vice-Presidents and the other seven would be incumbent GAIU Vice-Presidents. These officials were to serve on the General Board of the GCIU; the remainder of the General Board included "the fourteen incumbent Councillors from among the ranks of the

GAIU" and "[f]ourteen General Board members elected on a regional basis from among the ranks of the IP & GCU."

Thus, the GCIU General Board, the central governing body of the Union between Conventions, was to be composed of an equal number of representatives of each of the merging unions; and the merger agreement provided that as the number of officers and General Board members was gradually reduced, "Every effort will be made to maintain an equal balance in the number of members of the General Board from each of the merging organizations during the transition period. In any event, regardless of any imbalance in actual numbers, there shall always be equality of voting strength between the members of the General Board representing each of the merging organizations during the transition period." G.C. Ex. 34, p. 4, Sec. 12. The offices delineated above were to be filled only from the ranks of the respective merged organizations until 1992, when there would be only 10 offices (the President, the Secretary-Treasurer, and 8 Vice-Presidents) which would be filled without regard to prior affiliation.

The merger agreement recognizes a need for the two memberships to feel secure that the amalgamated union would continue to represent each of them fairly and forcefully, as the foregoing provision implies. While respecting this perception, the agreement at the same time phases in through the transition period an organization which will, eventually, achieve "the ultimate and strongly desired goal of one International Union for the entire graphic communications industry, with greater job security and economic prosperity of the thousands of men and women who contribute their labor to produce the diverse quality products of the industry."

The initial governing structure of GCIU was, as noted, 20 officers from the two Unions (to be gradually reduced to 10 officers by June 1992) and a "General Board" composed of those officers and 28 other members equally di-

vided between the Unions (to be reduced by June 1992 to 12 such other General Board members). It is difficult to agree with Respondent that the merger agreement "established an entirely new governing structure for the GCIU from that which prviously governed the IPGCU."

The latter Union was governed by a President, a Secretary-Treasurer, and eight Vice-Presidents (the latter being required to have specific kinds of craft-oriented membership, such as one Vice-President with a "commercial journeyman membership," one with a "newspaper journeyman membership," etc.).[14] These 10 officers constituted the IPGCU Board of Directors, which exercised dominant power over the Union between Conventions.

There *are* differences between the two kinds of administrations. The new governing board of GCIU consists not only of officers, but also of other members of the two Unions. Since the latter seats are equally divided during the transition period, the change seems to be of little importance. In addition, the GCIU would not, by 1992, be selecting Vice-Presidents by any kind of craft identification, as did the IPGCU; however, for the 1984 election, the eight IPGCU candidates for the offices of Vice-President *were* nominated according to their membership in the craft-related locals as had been spelled out in the former IPGCU Constitution (G.C. Ex. 34, p. 15, Art. III, Sec. 5). Thus, the terms of office being four years, the new Constitution continued the practice of Vice-Presidential craft representation from 1983 until at least 1988 for the 8 Vice-Presidents of IPGCU origin. Unlike the IPGCU Constitution, however, the non-officer General Board members of GCIU were to be selected on a regional basis. G.C. Ex. 34, pp. 18-19, Art. X, Sec. 2. A-E.

The significance to the IPGCU members of such changes seems questionable. On cross-examination, Local 61-C

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[14] The IPGCU Constitution had provided that chartered locals be designated as "commercial, newspaper, assistants, paper handlers, stereotyper and electrotyper and speciality." G.C. Ex. 33, p. 3, Art. I, Sec. 6.

President Brown admitted that just before the merger, he stated to his members that he "felt that the commercial section of the IPGCU wound up being underrepresented on that General Board." The "commercial" Vice-President on the *IPGCU* Board of Director's had been but one (or at most two, if the Canadian Vice-President was "commercial") person out of ten, however, so it is hard to conceive that any potential additional dilution could have seemed to be a serious matter.[15] It should furthermore be noted that the new Constitution has made special provision for the preservation of craft identification and control in the following paragraph found in the "Conventions" article of the new Constitution (G.C. Ex. 34, p. 28, Art. XVII, Sec. 13):

> Section 13. The Commercial, Paper Handler, Specialty, Newspaper, Stereotyper and Electrotyper Branches shall each have full jurisdiction in all matters pertaining to regulation and control of its own branch of the printing industry, insofar as the interest of other crafts is not affected; and when the Chairman and Secretary of the caucus held by the Branch certify over their signatures in the Convention that such a proposition has been adopted in caucus, it shall be announced by the chair and shall become the law of the International Union, unless two-thirds (2/3) of the delegates vote against such amendment.

This provision is taken verbatim from the former IPGCU Constitution, where it resided as the second section of an Article entitled "Legislation" (the first section of which authorized the International to change the Constitution and laws as it deemed necessary). G.C. Ex. 33, pp. 69-70, Art. XVIII. It was not referred to at the hearing. On its face, it seems to both preserve the vitality of craft identity and to repose a great deal of

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[15] As earlier stated, Brown sent a letter to his members in April 1983 urging approval of the merger.

power in the separate Branches to regulate their crafts. In addition, Chapter XVIII, p. 53 *et seq.*, of the new Constitution contains, under the heading "Practices Of The Former IP&GCU Unique To Their Respective Divisions," detailed provisions governing the work and benefits of the members of the various craft locals.

The extent to which the jurisdiction of the GCIU has been expanded, if any, in contrast to that of the IPGCU, is difficult to ascertain. The new Constitution reproduces verbatim the first significant clause of the former IPGCU jurisdiction provision by stating: "The trade jurisdiction of this International Union shall cover every aspect of printing, publishing, graphic and other forms of communications and related fields of operations." The new Constitution continues, however, "including but not limited to all work processes, operations and products directly or indirectly in whole or in any part incident to, associated with or related to lithography, offset, photoengraving, letterpress, gravure, intaglio, bookbinding and finishing, paper converting, and all workers wherever located and however described working in any industry whatsoever." In contrast, the rest of the former IPGCU jurisdiction clause seems more limited: "The work jurisdiction of this International Union shall cover all employees of private and public employers including printing, offset, intaglio and gravure pressmen, assistants, flymen, paper handlers, printing specialties and paper products workers, ink and roller makers, circulation workers, stereotypers, electrotypers and workers in associated operations."

While the words "lithography," "photoengraving," and "letterpress" do not appear in IPGCU's clause, these processes all constitute "printing," which does appear there. "Bookbinding and finishing" and "paper converting" were not expressly included in IPGCU's provision, but may well fall under "paper products workers" or "workers in associated operations." While certain specific job titles (e.g., "ink and roller makers," "stereotypers") found in the old

IPGCU Constitution do not appear in the new clause, they must surely be covered by the broad language of the new clause "all work processes, operations and products directly or indirectly in whole or in any part incident to, associated with or related to. . . ." [16] Although the new Constitution refers, finally, to "all workers wherever located and however described working in any industry whatsoever," I very much doubt that the GCIU intends a literal interpretation of that phrase to include, e.g., fishermen and poultry eviscerators. The preamble of the new Constitution states, "This International Union is part of and dedicated to the trend toward the formation of one Union *in the graphic communications industry*" (emphasis added), and thereafter refers to "our industry" and "the growth and expansion of the graphic communications industry."

It is interesting to note that under neither Constitution has Local 61 sought to duplicate the range of the respective Constitutional clauses. Prior to the merger, the relevant provisions of Local 61's bylaws provided jurisdiction over "all printing pressmen, assistants, apprentices, and all offset pressmen, assistants, and preparatory workers employed in the industry in the territorial jurisdiction above described, except those employed in newspaper printing pressrooms." The changes proposed by Local 61-C to its bylaws after the merger afforded jurisdiction over "all pressmen, assistants, offset preparatory workers, duplicator operators, bindery, specialty, art, typesetting, office workers, or any other workers in departments organized by this local and all registered apprentices in the various crafts employed in a particular

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[16] As earlier noted, the new Constitution expressly refers to the election of ex-IPGCU Vice-Presidents in 1984 from such "divisions" as "Paperhandler," "Stereotyper" and "Electrotyper," and "Specialty," and also to permanent "caucuses" of those crafts.

plant in the territorial jurisdiction described above." [17] It can be seen that while Local 61-C attempted to expand its jurisdiction after the merger to specify certain coverage not previously named, it did not, just as it had not pre-GCIU, try to make its jurisdiction expressly coextensive with that of the respective International Constitutions. Brown testified that the present jurisdictional clauses of the four Baltimore locals 'includ[e] each other's employees," but Local 61-C has "not organized anyone in that line . . . We just made it a possibility. If we do, we are covered."

The changes made here are not substantial. They arguably expand the potential jurisdiction of Local 61-C, which it seems, would be a more congenial modification in the eyes of the membership than a contraction, and yet the changes have not loosened the bonds of Local 61-C to the graphic communications industry.

Respondent argues, "General administration, including servicing of local unions, organizing and legal activity, was also merged, with a mandate that such services be reduced ([G.C. Ex. 34, Sec. 6])." In point of fact, there was no "mandate" to "reduce services." The merger agreement simply provides that the foregoing functions "are just a few areas wherein economic efficiencies can be effectively introduced," a matter to be studied by a committee of the top officers.[18]

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[17] Whether these changes are in effect is unclear. Local 61-C submitted them to GCIU. In a response from Recording Secretary Norton in 1984, Norton appeared to be saying that it was too soon to tell whether the proposed clauses would be in conflict with the clauses of other Baltimore locals, and that any such conflict would be resolved by the International President. Brown thought that the changes have taken effect.

[18] It was, however, contemplated, as one of the areas of economic efficiency, that the number of International Representatives servicing the GCIU Locals would be reduced by attrition. As of 1 July 1983, there were 33 International Representatives on the GCIU payroll. Since the merger, death and retirement have reduced the

IPGCU's Constitution had provided for the establishment by at least two local unions, with Board of Directors' approval, of "conferences," "councils," and "joint councils," and the Board of Directors could also charter "regional, national or other conferences" of locals; locals apparently could affiliate with these groups at their discretion. G.C. Ex. 33, pp. 5-6, Art. I, Secs. 10-15.[19] The merger agreement allowed these groupings to "continue to operate in the same manner as they did at the date of merger," but stated that the General Board would not "expand the funding for Councils or Conferences, or charter new Councils or Conferences except in the case of consolidation or merger." The effect of these provisions, as testified to by GCIU Secretary-Treasurer McNally, was to leave existing councils and conferences (of both IPGCU and GAIU) in place and even capable of increasing their affiliations, but they could not have an "expansion in funds."

The record is silent as to the amount of funding that the Board of Directors had ever furnished to the councils and conferences. The matter, however, appears to have been of no moment to Local 61-C, since there is no evidence that it has ever been a member of any such council or conference,[20] and there is no reason to believe that

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number of Representatives by 15, and only 3 new Representatives have been hired, leaving a total of 21 Representatives. Since the Representatives of each pre-merger Union presumably covered the same territory, there was most likely a considerable amount of duplicative travel and expense which has now been eliminated: and, since these employees earned—in 1983—roughly $35,000 each, the economic value of merger in such areas becomes apparent.

[19] GCIU Secretary-Treasurer McNally, however, testified to an instance in which the IPGCU Board had "turned down" an effort by a Denver local to affiliate with a California council, because "it was too far away."

[20] McNally testified that councils are formed to assist small locals, some as diminutive as 8 members. Local 61-C, on the other hand, has for some years had nearly 200 members.

the freezing of funds to such groups would ever have any material effect on 61-C.[21]

Respondent argues that the merger agreement "established new procedures for delegate selection and voting representation at the governing international convention." The agreement provided that for the upcoming 1984 Convention, voting would be weighed so as to equalize the voting strength of the two former groups. For the 1988 Convention and thereafter, the *number* of delegates would be based on the number of members in a local according to a formula which differed from that in the old IPGCU Constitution, but "[t]he principle of equal voting strength shall continue in force throughout the transition period, regardless of the number of actual delegates. . . ." G.C. Ex. 34, p. 7, Sec. 16.

It appears, from the formula contained in the old IPGCU Coustitution, that Local 61-C would have been entitled to about 3 delegates to an IPGCU Convention. G.C. Ex. 3, p. 47, Sec. 1. How meaningful these 3 delegates would have been at a convention representing some 91,000 other IPGCU members is conjectural. Under the new Constitution, in 1988 and thereafter, a local's delegate or delegates are entitled to vote on behalf of all of the local's members. G.C. Ex. 34, p. 29, Art. XVII, Sec. 17.C. IV.

In the end, it does not appear to be accurate to speak of "new procedures for delegate selection" for the Convention; the procedures differed, but still were essentially the same. There was, however, new "voting representation," in the sense that more people would be voting at GCIU conventions than at IPGCU conventions. If that fact were sufficient to change the "identity" of a local,

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[21] The Local has, however, continued its pre-merger affiliations with four union and craft organizations, such as the Metropolitan Baltimore Council of AFL-CIO Unions and the Allied Printing Trades of Baltimore. Local 61-C's representatives to these four groups have been President Brown and, with one change in 1983 or 1984, essentially the same individuals since at least 1981.

then all mergers of international unions would automatically destroy all of their subordinate locals' "identity." The Board has never so held.

As Respondent points out, unlike the former IPGCU Constitution, the new Constitution contains a "Code of Ethics" which imposes certain standards of conduct upon officers, agents, representatives, and trustees of the various constituent bodies and benefit funds of GCIU, and requires the establishment of a Committee on Ethics in each local, together with annual reports. These provisions have no direct impact upon the rank-and-file memberships of the locals, and many of the standards of conduct are already applicable by virtue of the common law and the Labor-Management Reporting and Disclosure Act. Moreover, one sentence of the IPGCU's old obligation of membership ("I further promise that I will not wrong a brother member or see him wronged if it is in my power to prevent") arguably covers most of the fiduciary responsibilities spelled out in detail in the Code of Ethics.

A basic contention made by Respondent is that the merger constituted a "takeover" of IPGCU by GAIU.[22] One of the more specific allegations made in this category has to do with the finances of the parent organizations.

Respondent asserts on brief that "[p]rior to the merger, the IPGCU general fund contained more than two million dollars while the GAIU general fund ran a deficit of $16,276 (Resp. Ex. 106)." The last-named exhibit

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[22] On brief, Respondent has renewed its complaint about my refusal to grant a delay so that it might subpoena GCIU Vice-President James J. Mitchell, a resident of New Jersey, to testify (1) about the history of the authority of the GCIU and IPGCU governing boards to pass upon proposed affiliation of locals with councils and (2) about Mitchell's opinion that some persons in the new organization desire to erase from it all vestiges of the IPGCU. I found that the first objective concerned a remote matter, particularly as it related to Local 61-C, and the second would have involved the hearing in a useless controversy about the existence of a conspiracy. I see no reason to believe that my ruling was erroneous.

is a memorandum to IPGCU Board members dated 1 November 1982.[23] Financial statements for GAIU (G.C. Ex. 36) as of 30 June 1983 tell a somewhat different story. As of that time, GAIU had in its General Fund cash resources of $43,584 and liquid investments of $582,932; however, for the *13* months ended 30 June 1983, the General Fund had shown a loss of $552,888 (as compared to a loss of $168,822 for the year ending 31 May 1982). Nonetheless, GAIU's balance sheet for the General Fund as of 30 June 1983 showed a net balance of $330,010.

IPGCU, however, also displayed some weaknesses in its General Fund for the year ending 30 June 1983, showing excess expenses of $96,205. But IPGCU's apparently strong General Fund balance of that date was $4,597,456.

Analysis of the copious financial statements seems undesirable in this lengthy opinion, but two points may be worth making. One is that the 1983 GAIU General Fund balance sheet lists as liabilities "Inter-fund payables" of $2,086,349, derived from General Fund debts to other funds operated by the GAIU; it also shows a separate loan payable to the GAIU Mortuary Fund of $800,352. The IPGCU financial statements, on the other hand, note that "All interfund transactions and balances have been eliminated." G.C. Ex. 40, p. 5, item 1. Thus, comparison of the General Fund balances of the two Unions as of the merger date is not possible.

Secondly, the GAIU owned a headquarters building which it had purchased in 1971 for $3,625,000; at the time of the merger, it was valued on a cost basis less depreciation at almost $3,000,000. An appraisal on 9 December 1982, however, valued the building at $16,500,000. G.C. Ex. 36, pp. 10-11, item 2. After the merger, this

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[23] It was evidently this document to which GCIU Secretary-Treasurer McNally referred when he agreed at trial that the GAIU General Fund showed a $16,000 deficit "prior to the merger."

building would be commonly owned by all GCIU members. The IPGCU, on the other hand, owned no real estate and was renting its headquarters under a lease arrangement which would rise from $330,744 in 1984 to $438,460 in 1987.

The essential problem with the GAIU, McNally reported in his November 1982 memorandum, was its comparative inefficiency, causing a cash flow problem. There is no reason to believe that the two unions did not in fact, as stated in the merger agreement, "anticipate accelerating financial stress during the immediate period ahead" and did not sincerely share the opinion that "economic efficiencies can be effectively introduced, which will moderate the financial burden of the merged membership." G.C. Ex. 34, p. 2, item 6. Subsequent to the merger, 36 employees have left the GCIU payroll and only 8 new employees have been hired. Annual GCIU excess expenses in the General Fund acount dropped from $1,358,988 for the year ending 30 June 1984 to $326,109 for the year ending 30 June 1986 (G.C. Exs. 37, 38, 39).

Another aspect of the "takeover" alleged by Respondent is that the merged organization, including Local 61-C in this litigation, is now represented by Delson & Gordon, GAIU's former law firm. Local 61-C President Brown "thought" he recalled that the Director of Organizing for the International had made the decision for his Local to be represented by the firm, although the Local had not previously been represented by it, but he seemed to be attributing the need for a new attorney to the fact that the Baltimore attorney who had previously represented the Local was no longer available.

It is at least Clear that the choice of Delson & Gordon was, as Brown testified, directed by higher GCIU authority, but the issue does not seem very consequential insofar as the continuation of the Local's identity is concerned. The Local's regular attorney left town; counsel was needed; former GAIU counsel was retained. New

legal representation is, obviously, unavoidable in such circumstances. Moreover, the fact that GCIU has employed GAIU's former counsel as its attorneys seems to no more demonstrate a "takeover" by GAIU than the fact that GCIU now employs as its auditor the firm which used to work for IPGCU demonstrates the primacy of the latter.[24]

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[24] Respondent urges that President Brown not be credited in certain areas "in view of the repeated contradictions between his testimony on cross-examination and both his direct testimony and his sworn pre-hearing affidavit." As an example, Brown testified on direct exaamination that the merger brought about only a few changes in the Local's bylaws: that the Local was "instructed" to change the name, but that the modifications of the jurisdiction and "form of organization" clauses were adopted by the Local on its own initiative. Respondent asserts on brief that Brown wrote in his affidavit that "there had been no changes in Local 61's 'bylaws, officers, or dues' following the merger (Tr. 45-46)."

The language purportedly quoted by Respondent on brief does not appear in the transcript. It does not even appear in the affidavit (at the hearing, I felt it unnecessary to receive the affidavit because I was led to believe that any inconsistencies had been brought out in the testimony; I now reverse my ruling). The affidavit states that "[t]he same officers, local dues structure, Local Constitution and Bylaws and geographical jurisdiction that existed prior to the merger between the IP&GCU and GAIU were retained by Local 61 after the effective date of the merger." The record does not show these assertions to be untrue: the bylaws were not changed until a membership meeting on 23 October 1983, and then in the relatively minor manner earlier noted; the date of resignation of Local Vice-President Hosza in or around 1983 is not clear, but he retired perhaps in May as a result of disability, not the merger, and was evidently replaced soon *after* the date of the merger by a sitting member of the Local Executive Board; and, as Brown expressly pointed out at the hearing, he had said in the affidavit that there had been no change in the "dues structure," not the "dues."

It appeared to me that Brown was doing his best at the hearing to recall some relatively ancient history. He probably did not recollect everything accurately, and he demonstrated some unfamiliarity with the details of both the old and new Constitutions, but he tried. I was impressed by his admission that he told the members that the "commercial" section would be "underrepresented" on the new

Respondent advances an argument that the privisions of the GCIU Constitution assigning the offices of President, Recording and Financial Secretary, and Executive Vice President during the transition period only to former GAIU members is violative of section 401 (e) of the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 481 (e).[25]

Record evidence shows that the Department of Labor warned GCIU International President Kenneth Brown in 1983 that the transitional Constitutional restrictions on the eligibility of general officers would "constitute a violation of Title IV of the LMRDA, and subject those officer elections to challenge, pursuant to Section 402 of the LMRDA." Nonetheless an election held in 1984 apparently went unchallenged. Minutes of a General Board meeting in February 1987 state that Vice-President Mitchell had written the President that the procedures "may be in violation of the law" and that if the General Board did not act to assure compliance with the statute, Mitchell would file a complaint. The President noted that the same transitional procedures had been used by "all the former International Unions that now make up the GCIU" and that if a complaint was filed with regard to the 1988 elections, the matter would be dealt with at that time.

Respondent argues, first, that the continuing dispute over the eligibility requirements "makes it impossible to state with certainty that no additional changes will take place in the near future which could further affect the union's claim to continuity." However, if a complaint is filed in 1988, under any scenario the most that could

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board. To the extent that my conclusions here rest on Brown's credibility, I view his testimony with favor except where the evidence otherwise shows that his memory failed him.

[25] The statute requires that "every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 of this title and to reasonable qualifications uniformly imposed)...."

happen would be that a special election would be held (before the unrestricted 1992 elections roll around) without such built-in preferences. That sort of result, however, would hardly militate in favor of Respondent's claim that the continuity of Local 61-C could be even more attenuated by future events. And in 1992, as earlier pointed out, the union-origin restrictions will disappear.

As the second prong of this argument, Respondent asserts that the "illegal and discriminatory structure also constitutes an independent ground for Respondent's refusal to bargain, as the Board has in the past revoked the certifications of unions engaged in unlawful, invidious discrimination," citing *Independent Metal Workers Union, Local No. 1*, 147 NLRB 1373, and *Handy Andy, Inc.*, 228 NLRB 447, 456. Respondent contends that in *Handy Andy*, the Board failed to act upon the allegations of union discrimination "solely because they were raised in a representation proceeding, rather than in an 'appropriate unfair labor practice proceeding,' " and that the present case falls into the latter category. Respondent misreads *Handy Andy*. The Board at least three times (228 NLRB at 451, 453) stated that it was addressing the question of raising a union discrimination defense in a "certification and bargaining order" context, and also made singularly clear that it will entertain such an issue only in those "unfair labor practice proceedings" in which the union stands formally accused of discrimination. *Id.* at 455-56.

Moreover, I very much doubt that the type of "discrimination" under discussion would, in any event, be that contemplated by the Board in *Handy Andy*. Nor is it clear that the reservation of designated national positions for members of each Union for a transitory period in a merger situation is violative of 29 U.S.C. § 481 (e). Respondent offers no citations to support its claim of illegality. In *Wirtz v. Hotel, Motel & Club Employees Union, Local 6*, 391 U.S. 492, the Court found unreasonable a

bylaw which made 97 percent of the membership ineligible to run for office, pointing out that "[u]nduly restrictive candidacy qualifications can result in the abuses of entrenched leadership that the LMRDA was expressly enacted to curb" (at 499). The present circumstances do not appear to present a case of "entrenched leadership"; in any event, if by some chance a determinative finding should be made prior to 1992, when the union-affiliation restrictions terminate, that the restrictive provision is unlawful, an article in the GCIU Constitution would invalidate it. G.C. Ex. 34, p. 47, Art. XXXIII.

Since it refers to the matter at four different places in its brief, Respondent obviously attaches some significance to the fact that "Local 61-C's office address following the merger also was different from that of Local 61 (Tr. 46-47)." The cited source makes clear, however, that the reason for the relocation (which in fact did not occur until "a year and a half ago") was that the original office building was "torn down," which makes it somewhat difficult to comprehend why this change might seem merger-related.

IV. Analysis and Conclusion

In *NLRB v. Financial Institution Employees*, *supra*, 106 S. Ct. at 1014, which involved the affiliation of an independent union with a national union, the Court made the broad statement that "[i]n many cases, a majority of employees will continue to support the union despite any changes in affiliation," citing with apparent approval the even broader statement in *American Range Lines, Inc.*, 13 NLRB 139, 154, that affiliation "has no probative value concerning the employees' choice of the [union] as their collective bargaining representative."

As earlier discussed, this latter fiat is more expansive than the Board has since been willing to be. And even the Court in *Financial Institution Employees* accepted that if changes in the affiliating entity "are sufficiently dramatic to alter the union's identity, affiliation may

raise a question of representation . . ." *Id.* at 1016. The Court decisively disagreed with the employer, however, that "affiliation necessarily changes the union's identity." *Id.* at 1015.

In so stating, the Court appeared to put in question the position of the Court of Appeals for the Tihrd Circuit, which, while examining the facts in each such case, has generally viewed the superimposition of a national structure upon a formerly independent union as almost inevitably creating a change in identity. See *Sun Oil Company of Pennsylvania*, 228 NLRB 1972, revd. 576 F.2d 553 (C.A. 3), and cases cited at 554. The Board has nonetheless persisted in holding that if the effects of the affiliation are such that the localized authority and character of the independent are not significantly impaired by the association with the international union, the baggage which always accompanies such affiliations (e.g., *per capita* taxes and other obligations to the adoptive parent) does not affect the essential identity of the former bargaining representative. Indeed, in *New Orleans Public Service, Inc.*, 237 NLRB 919, 921, involving the affiliation of an independent with an international, the Board assumed "an entirely new set of bylaws, . . . a new system of internal union discipline, . . . a different fee schedule, and that persons outside the unit may be involved in the removal of officers, the investigation of membership applications, the amount of initiation fees, and the expenditure of funds," but still found "no essential change in the identity of the bargaining representative" in view of the retention of various insignia of local control after the affiliation. Circuit Courts have agreed: *St. Vincent Hospital v. NLRB*, 621 F.2d 1054 (C.A. 10); *NLRB v. Insulfab Plastics, Inc., supra.*

In the present case—a local *already* affiliated with an international union which merges with another international—the theoretical basis for concluding, in the Supreme Court's words in *Financial Institution Employees*,

that "it is unclear whether the reorganized union retains majority support," is considerably more narrow. Here the unit employees voted in the first instance to be represented by a labor organization which itself was under the governance of another larger organization; they chose to be part of a national structure, with all the added freight that such a relationship entails and portends. It thus cannot be said here, as it was in *American Bridge Division, U.S. Steel Corp. v. NLRB*, 457 F.2d 660, 664 (C.A. 3), where an independent became associated with a national union. "The very act of affiliation here is a commitment to change in the fulcrum of union control and representation."

Although the GCIU Constitution was a new one [blending, however, many provisions of both former Constitutions), "[t]he factual determination at issue revolves not around superficial criteria such as . . . organizational differences in the national unions of which they become a part." *J. Ray McDermott & Co. v. NLRB*, 571 F.2d 850, 857 (C. A. 5). In cases like this one, the Board (consistently) and the Courts (frequently) have paid little attention to the fact that the merger of international unions necessarily wrought changes in the governing entity. When the International Brotherhood of Bookbinders merged in 1972 with the Lithographers and Photoengravers International Union to become the GAIU, and an employer raised the issue of the changed identity of a local of the former Bookbinders, neither the Administrative Law Judge nor the Board even made reference to the new Constitution, *Pearl Bookbinding Company, Inc.*, 206 NLRB 834, and the Court of Appeals for the First Circuit, in *NLRB v. Pearl Bookbinding Company, Inc.*, 517 F.2d 1108, 1111, other than summarizing the Respondent's argument predicated on the local being "subordinate to a new international with a new president and constitution," concentrated entirely on those local factors reflecting a continuity of representation.

Similar superficial treatment by the Board was accorded the affiliation of Retail Clerks International Association and thhe Amalgamated Meat Cutters and Butcher Workmen of North American when, in 1979, they joined together as the United Food and Commercial Workers International Union. The Board briefly recited certain aspects of the merger agreement, such as the integration of the national officers of the two unions into a single hierarchy, the transfer of membership, property, rights, and obligations from both unions into the new one, the allowance of "some discrepancies" between the constitutions of the locals and that of the new application, and concluded that the newborn organization and its locals succeeded to the representational rights of the merged organizations. *Warehouse Groceries Management, Inc.*, 254 NLRB 252, 255-56, enfd. *per curiam*, 111 LRRM 2137 (C.A. 1).

In the instant case, there were no changes in the higher-echelson governance by virtue of the merger which could be deemed to seriously raise the question whether a majority of the Respondent's bargaining unit employees would continue to desire Local 61-C as their bargaining representative. And at the local level, Local 61-C essentially retained its longstanding identity. Respondent argues that '[l]ack of local autonomy following an international merger is one of the most significant factors leading to a Board finding of change in identity. . . ." In my view, however, the proper question in a case like this one is not whether there is a "lack" of local authority, but whether the preexisting local authority, with which the unit employees had presumptively been satisfied, has substantially *changed* for the worse. The record shows that almost all of the same officers (with an exception unrelated to the merger) continued to serve after the merger; the Local's bylaws remained virtually the same, with a few changes that are, as a practical matter, of no consequence; the dues structure, including the procedure for increasing dues, remained intact, as did the

per capita payments to the parent union; the Local's assets remained its own; the negotiating committees stayed basically the same, with only normal, non-merger-related, turnover; and strike sanctions are still, as they were prior to the merger, subject to higher-level approval.[26]

Only one factor gives me pause, but not for long. As previously discussed, Respondent believes that under the IPGCU Constitution, the International had "approved or disapproved local collective bargaining agreements." If that were true, and the GCIU simply continued to exercise similar authority, the merger would have effected no change in the relative autonomy of Local 61-C. If, however, the members of the Local possessed the authority before the merger, but did not thereafter, to finally consummate their own bargaining agreements, a question of continuation of identity would be raised.

In previous discussion of this issue, it appeared, in my view, that the former IPGCU Constitution did not require submission of bargaining agreements for prior clearance by the International, but did impose various requirements which must be included in the agreements; failure to win employer acquiescence in such provisions would, I assume, have effectively precluded an IPGCU local from entering into agreements. The new GCIU Constitution, which states that local agreements are "subject to approval" by the International President, may mean only that the President can intervene to prevent the execution of an agreement, and not that he must formally approve every contract before it takes effect; or it may mean the latter.

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[26] These facts render distinguishable the cases cited by Respondent, all of which (other than the Third Circuit cases) involved complete and new dominance over, or absorption of, one labor organization by another, e.g., *The Gas Service Company*, 213 NLRB 932, 933 ("a new and different labor organization with its own officers and a complete change in the representative").

Brown was of little definitive help on this issue. He testified to his belief that once a Local and an employer agree on a contract, it is "legal and binding." But he also said that he "thought" Local 61-C had "always" submitted contracts for International "approval," both before and after the merger. He maintained, however, that "it is still a contract on the local level, whether the International approves or not, actually." I note that Brown testified that he sends copies of "proposals" to the International to make sure the Local is not violating any Federal law or International bylaw, and he may send copies of the consummated contracts to the International for the same purpose.

On the other hand, Respondent may be correct in asserting that the IPGCU International routinely approved or disapproved local bargaining agreements, based on knowledge Respondent would have acquired from an examination of the Union's records. At the hearing, counsel for the Union stated, in summarizing the documents provided to Respondent pursuant to a subpoena to the International, "We provided in response to specific paragraphs requesting information about such items, the strike sanction, *contract approvals*, documents discussing the merger." Counsel further stated that, from the files of 10 randomly selected Locals, "[f]ive from the former GAIU and five from the former IPGCU," the Union "provided files of the contract and research department, reflecting contract refusals, which was—approvals which was a stack about five inches high." Respondent did not contradict these representations, and the files thus produced may account for the position taken on brief that the former IPGCU approved or disapproved bargaining agreements.

Given the ambiguity of the evidence and of the "subject to approval" clause, as originally discussed above (compare G.C. Ex. 34, p. 51, Ch. 13.2, with Ch. 13.3), together with the fact that the IPGCU Constitution it-

self had imposed various limitations upon the ability of Locals to negotiate their own contracts with total independence, I am not persuaded that a sufficient showing of substantial change has been made on this issue. I might further note that the Board has not found a change in identity where, in addition to other constitutional restrictions and obligations assumed by an independent's affiliation with an international, the international did not permit its locals to sign bargaining agreements which failed to incorporate a prescribed national wage floor. *Sun Oil Company of Pennsylvania, supra.*

Accordingly, I conclude, as a matter of law, that the 1983 merger of the International Union did not cause a substantial change in the identity of Local 61-C and a consequent lack of continuity of representation by Local 61-C with respect to the Respondent's employees in the certified unit. Since the Board has also ordered that I make "recommendations," I recommend that the Board adopt the following: [27]

SECOND SUPPLEMENTAL ORDER

The Order by the Board in the original proceeding in this case (265 NLRB No. 115) is hereby reissued.

Dated, Washington, D.C. 11 February 1988

/s/ Bernard Ries
BERNARD RIES
Administrative Law Judge

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[27] In the event no exceptions are filed as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 5-CA-14585

NATIONAL POSTERS, INC., AND NATIONAL LITHO,
A DIVISION OF NATIONAL POSTERS, INC.,
Respondent-Employer,

and

BALTIMORE PRINTING PRESSMEN AND
ASSISTANTS UNION, NO. 61,
Charging Party-Petitioner.

AFFIDAVIT

I, Diane Hild, being duly sworn, hereby depose and state as follows:

1. I am the Vice President of National Posters, Inc. (the "Company") and have been employed by National Posters, Inc. for approximately eight years. I am familiar with the Company's payroll records and with certain changes which have taken place between 1981 and the present.

2. In December 1981, at the time of the representation election in the above-referenced matter, the Company employed approximately 55 full-time and regular part-time bargaining unit employees at its two facilities, National Posters and National Litho.

3. At the present time, the Company employs 137 full-time and regular part-time employees in the bargaining unit. Of the 55 bargaining unit employees employed in

December 1981, 18 of these employees, or 33%, have since left the bargaining unit. Of the 137 employees currently employed in the bargaining unit, 100 or 73%, have been hired since the representation election and did not have an opportunity to vote in December 1981.

4. The figures set forth above do not include seasonal casual employees such as Mr. Samuel John, who was found to be an eligible voter by the National Labor Relations Board. Of the approximately ten casual employees of different types who were considered to be on-call at the time of the election, including Mr. John, none is currently employed as such by the Company. The Company no longer employs any on-call workers.

5. I have read the foregoing statement and swear that it is true and accurate under penalties of perjury.

Date 3/9/88 /s/ Diane Hild, V.P.
DIANE HILD

No. 89-914

In the Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL POSTERS, INC. AND NATIONAL LITHO, A DIVISION OF NATIONAL POSTERS, INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Associate General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the Board acted within its discretion in ordering petitioners to bargain with the certified representative of their employees notwithstanding the passage of time and the employee turnover that occurred while petitioners were litigating their obligation to bargain.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 885 F.2d 175. The second supplemental decision and order of the National Labor Relations Board (Pet. App. 113a-156a) is reported at 289 N.L.R.B. No. 58. The initial opinion of the court of appeals (Pet. App. 14a-30a), remanding the Board's initial decision and order (Pet. App. 50a-61a), is reported at 720 F.2d 1358. The Board's first supplemental decision and order after remand (Pet. App. 62a-112a) is reported at 282 N.L.R.B. 997.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1989. The petition for a writ of certiorari was filed on December 11, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On December 15, 1981, the Board conducted a representation election among petitioners' production and maintenance employees at their two Baltimore, Maryland locations. The tally of ballots showed 24 votes for the Baltimore Printing Pressmen and Assistants Union, Local 61 (the Union) and 21 votes against. Four ballots were challenged—a number sufficient to affect the result. The Union challenged three ballots, that of a plant clerical and those of Albert Amend and Wesley Souders who it claimed were supervisors. Petitioners challenged the ballot of Samuel John who they claimed was a casual or seasonal employee. Pet. App. 15a, 31a-32a.

On March 16, 1982, the Regional Director, without holding a hearing, ruled *inter alia* that the ballots of John and the plant clerical should be opened and counted.[1] Pet. App. 32a-35a, 35a-36a. The Regional Director also dismissed objections to the conduct of the election filed by both petitioners and the Union. Pet. App. 36a-47a.[2] The

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[1] The Regional Director determined that a hearing would be necessary to determine the challenges to the ballots of Amend and Souders. However, the Regional Director declined to order a hearing pending a determination if, under the revised tally, those votes would not be determinative. Pet. App. 35a, 48a.

[2] Petitioners contended that the Union misrepresented various benefits and obligations of union representation and falsely claimed that petitioners' president had made large gifts to his children. Pet. App. 36a-41a. The Regional Director found that the allegation concerning family gifts, even if true, did not amount to an allegation of "corporate misfeasance" (Pet. App. 38a); the remaining allegations were not supported, as required by the Board's procedures, by signed witness statements. Pet. App. 40a-41a. The Regional Director determined that one of the objections made by the Union—a claim that petitioners had improperly provided employees a free health plan in order to persuade them not to vote for the Union—raised issues of

Board upheld the Regional Director's rulings. The revised tally showed the Union ahead by 25 to 22 and, on July 14, 1982, the Union was certified as bargaining representative. Pet. App. 67a.

Thereafter petitioners refused to bargain with the Union, and the Union filed unfair labor practice charges. The Board, on December 10, 1982, found that petitioners had violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(5) and (1), and ordered petitioners to bargain with the Union upon request. Pet. App. 50a, 55a, 57a-58a.

Petitioners then sought review of the Board's decision. The court of appeals, one judge dissenting, found that John's employment status raised material issues of fact about his eligibility to vote and remanded the case to the Board for an evidentiary hearing. *National Posters, Inc.* v. *NLRB,* 720 F.2d 1358 (4th Cir. 1983); Pet. App. 14a-27a. The court also held that petitioners "should be given the opportunity to amend [their] objections" to the election in light of the Board's new rule in *Midland National Life Insurance Co.,* 263 N.L.R.B. 127 (1982), limiting the circumstances under which elections would be set aside because of misrepresentations.[3] Pet. App. 25a-26a.

2. Pursuant to the remand, the Board directed that a hearing be held to determine John's eligibility to vote. Pet.

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fact that could only be determined after a hearing. Pet. App. 41a-42a. That hearing became unnecessary after the opening of two of the challenged ballots revealed the Union a winner in the election. Pet. App. 48a.

[3] In *Midland National Life Insurance Co.,* the Board held that it would no longer set aside elections based on misleading campaign statements, unless the "deceptive manner" in which the statements were made precluded the voters from evaluating them. 263 N.L.R.B. 127, 133 (1982). The Board also determined to apply its new rule retroactively. *Id.* at 133 n.24.

App. 68. On November 23, 1984, after the hearing, the administrative law judge issued a recommended decision finding that John had a reasonable expectation of continued employment on the date of the election and that he was eligible to vote. Pet. App. 94a-95a.[4] Accordingly, the ALJ recommended reissuance of the Board's original decision and order.[5] Pet. App. 111a.

On February 4, 1987, the Board issued a decision and order affirming the ALJ's findings regarding the eligibility of John, Amend, and Souders. Pet. App. 63a. However, the Board also granted petitioners' motion to reopen the record. The Union's parent, the International Printing and Graphic Communications Union (IPGCU), had merged during the pendency of the litigation with the Graphic Arts International Union (GAIU) to form the Graphic Communications International Union (GCIU). After the merger, the Union changed its name to the Baltimore Graphic Communications Union, Local No. 61-C, an affiliate of the GCIU. The Board determined that more information was necessary to decide whether the merger between the IPGCU and GAIU so substantially changed the Union as to have affected the Union's continued status as representative of a majority of petitioners' employees. Pet. App. 63a-64a. The Board rejected petitioners' contention that the high turnover rate among their employees since

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[4] The Board had also directed that evidence be taken to resolve the issue of the supervisory status of Amend and Souders, because if John's vote were disallowed, those two votes could be determinative. Pet. App. 68a. The ALJ found that Amend was a supervisor but that Souders was not. However, because Souders' vote would not be determinative given the ruling with respect to John, the ALJ declined to order the opening of Souders' ballot. Pet. App. 96a-111a.

[5] The ALJ also noted that petitioners had not pursued the opportunity afforded by the remand to have a hearing on their objections to the election. Pet. App. 68a n.3.

the election required the holding of a new election. Pet. App. 64a n.4.

3. The ALJ reopened the hearing on July 29, 1987. Pet. App. 122a. On February 11, 1988, the ALJ issued a recommended decision in which he concluded that the internationals' merger caused no substantial changes in the Union that could raise a question concerning representation. Pet. App. 156a. On June 30, 1988, the Board upheld the ALJ's recommended decision. Pet. App. 114a. The Board also denied petitioners' request to reopen the record to take evidence concerning the turnover that had occurred since its prior decision or to reconsider its prior ruling that the "turnover" argument lacked merit. Pet. App. 113a n.1. Accordingly, the Board found that petitioners violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union and it reaffirmed its bargaining order. Pet. App. 114a-115a; see also *id.* at 56a-57a.

4. The court of appeals enforced the Board's order. Pet. App. 2a. It concluded that substantial evidence supported the Board's conclusion that John was eligible to vote. Pet. App. 7a. The court also agreed with the Board that the merger between the IPGCU and the GAIU did not raise a question concerning the Union's representative status. Pet. App. 8a-11a. Citing *NLRB* v. *Financial Institution Employees*, 475 U.S. 192, 207 (1986), the court noted that "[w]hile changes in the governing structure of a local union's national affiliate could alter the identity of the local, especially if the local's bargaining autonomy is consequently restricted, it is the substantial continuity of the local union rather than the affiliate that remains at issue." Pet. App. 10a. The court then concluded that the merger did not substantially affect the relationship between the Union and the unit employees. Pet. App. 9a-11a.

Finally, the court rejected petitioners' assertion that they were entitled to have the record reopened to present evidence concerning employee turnover since the election. Pet. App. 11a. The court acknowledged that "[c]ourts have, albeit rarely and in extreme cases, declined to enforce bargaining orders because of undue delay, attributable to the NLRB, in the resolution of election disputes." *Ibid.* But while it pointed out that "[n]o good reason" accounted for the two and a half year delay between the first hearings on John's eligibility and the Board's decision (Pet. App. 12a n.5), the court indicated that it was not appropriate to place "the entire blame for the eight year delay in the proceeding below on the NLRB." Pet. App. 12a. Rather, the court turned to an examination of the record, finding it "entirely devoid of evidence that new employees are dissatisfied with or otherwise opposed to Local 61-C's representation." Pet. App. 12a-13a. The court concluded that the "bare fact that employee turnover has occurred [within] the eight years since the election" provided no basis for doubting the Union's continuing majority status. Pet. App. 12a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Barring unusual circumstances, a union's majority status may not be questioned during the year following the union's certification. *Brooks* v. *NLRB,* 348 U.S. 96 (1954). The certification year has never started to run in this case, because that period does not begin until the employer commences bargaining with the union in good faith, and petitioners have not yet done so. *NLRB* v.

Action Automotive, Inc., 853 F.2d 433, 434 (6th Cir.), cert. denied, 109 S. Ct. 865 (1989); *Mar-Jac Poultry Co.*, 136 N.L.R.B. 785 (1962). Petitioners essentially contend that the passage of time and the turnover that occurred while they were litigating their obligation to bargain constitute unusual circumstances precluding the issuance of a bargaining order.[6] There is no merit to that contention.

This Court has consistently held that a union's loss of majority status during delays due to litigation does not terminate an employer's obligation to bargain. Otherwise, as the Court explained in *Frank Bros.* v. *NLRB*, 321 U.S. 702, 705 (1944), "procedural delays necessary fairly to determine charges of unfair labor practices might in this way be made the occasion for further procedural delays in connection with repeated requests for elections, thus pro-

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[6] Petitioners assert (Pet. 12, 17, 21) that the change in the Union's affiliation and unresolved allegations of Union misrepresentation during the election campaign are also factors which bear on the propriety of a bargaining order. However, the court of appeals found that the merger of the Union's parent international raised no question concerning the Union's continuing majority status (Pet. App. 10a-11a), and petitioners have not challenged that finding in their questions presented for review (Pet. (i)). See Sup. Ct. R. 14.1(a). Nor did petitioners pursue the opportunity afforded by the court of appeals, in its initial decision remanding this case to the Board, to pursue their allegations concerning Union misrepresentations. See pp. 3-4 & note 5, *supra*; Pet. App. 68a n.3. In addition, petitioners have not raised in their questions presented any contention concerning retroactive application of the Board's rule in *Midland National Life Insurance Co.*, *supra*, that misrepresentations no longer warrant the setting aside of an election unless deception in the manner they are made precludes their evaluation by voters. (In any event, the courts of appeals have uniformly approved retroactive application of *Midland*. See, *e.g.*, *NLRB* v. *Best Products Co., Inc.*, 765 F.2d 903, 911 nn.8-9 (9th Cir. 1985).) Accordingly, as the court of appeals observed (Pet. App. 11a-12a), the only issue here is whether delay and "bare assertions of employee turnover" warrant further consideration of the propriety of the bargaining order.

viding employers a chance to profit from a stubborn refusal to abide by the law." See *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 610-613 (1969); *NLRB* v. *Katz*, 369 U.S. 736, 748 n.16 (1962); see also *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 37-38 (1987).

This case illustrates that concern. The Union won a representation election in 1981 and was certified as the bargaining representative of petitioners' employees in 1982. Since that time, petitioners have pressed a variety of objections to the Union's representative status, none of which has been found meritorious. While petitioners assert (Pet. 11-12) that the passage of time here was attributable to the Board's "inexcusable delays," the court of appeals correctly points out (Pet. App. 12a & n.5) that only the hiatus between the ALJ's and the Board's post-hearing decision on John's eligibility was attributable to unexplained delay by the Board.[7]

In any event, while noting that "[i]nordinate delay in any case is regrettable," this Court has rejected the contention that enforcement of a bargaining order should be denied or conditioned on the holding of a new election because of the Board's delay in issuing the order, even in the presence of the employees' subsequent repudiation of the union. *Katz*, 369 U.S. at 748 n.16. Here, as the court of appeals noted (Pet. App. 12a-13a), the record is "entirely

[7] Petitioners also contend (Pet. 11) that the Board unduly delayed the proceedings by failing to hold a hearing on their ballot challenges prior to certification. But as indicated by the fact that one judge dissented from the initial panel decision on the ground that no hearing was necessary (see Pet. App. 28a-30a), the Board's determination of the challenges without a hearing cannot be deemed egregious administrative action. Indeed, if anything, it represented an attempt to resolve election issues expeditiously.

devoid" of evidence that the new employees are dissatisfied with or oppose Local 61-C's representation.[8]

2. The courts of appeals have consistently rejected employers' claims of employee turnover as a justification for refusing to bargain with a Board-certified union during the certification year. See, *e.g.*, *Action Automotive*, 853 F.2d at 434-435; *NLRB* v. *Star Color Plate Service*, 843 F.2d 1507 (2d Cir.), cert. denied, 109 S. Ct. 81 (1988); *NLRB* v. *Best Products Co.*, 765 F.2d 903, 913-914 (9th Cir. 1985); *NLRB* v. *Little Rock Downtowner, Inc.*, 414 F.2d 1084, 1091 (8th Cir. 1969); cf. *NLRB* v. *Patent Trader, Inc.*, 426 F.2d 791 (2d Cir. 1970) (en banc).

The cases cited by petitioners (Pet. 13-18) are not to the contrary. A number of those cases involved a union that, unlike the Union here, had never been properly certified. Thus the court in *Mosey Mfg. Co.* v. *NLRB*, 701 F.2d 610 (7th Cir. 1983), invalidated the Board's certification of a union because of union misrepresentations under the standard then applied by the Board to evaluate such misrepresentations. The court refused to remand the case to the Board for examination under a subsequently adopted standard because five and a half years had elapsed since the election and the court was not sure that the Board intended the new standard, which had been adopted and re-

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[8] Petitioners complain (Pet. 18-20) that the court of appeals improperly relied on *NLRB* v. *Financial Institution Employees*, 475 U.S. 192 (1986), in concluding that their attack on the propriety of the bargaining order could not succeed unless the circumstances relied upon provided an objective basis for believing the Union had lost its majority status. However, this standard was, if anything, more accommodating than necessary to petitioners. In *Brooks* v. *NLRB*, 348 U.S. 96, 103 (1954), this Court made clear that loss of majority status was not an unusual circumstance affording grounds for refusing to recognize the bargaining agent during the certification year; as noted above, the certification year in this case has yet to run.

jected and readopted during the pendency of the litigation, should apply on the anomalous facts of the case. *Id.* at 611-613, 615. Similarly, in *NLRB* v. *Triplex Mfg. Co.*, 701 F.2d 703, 709 (7th Cir. 1983); *NLRB* v. *Nixon Gear, Inc.*, 649 F.2d 906, 914 (2d Cir. 1981); and *NLRB* v. *Connecticut Foundry Co.*, 688 F.2d 871, 881 (2d Cir. 1982), the courts declined to remand cases to the Board where certifications had been held invalid due to denial of hearings on election objections. The courts decided that passage of time had both decreased the ability to hold a fair hearing on the objections and called into question the union's continuing majority support. Unlike those cases, this case does not involve another time-consuming remand (see *Star Color*, 843 F.2d at 1509); the Board's order requires the petitioners to bargain with a union properly certified after an election which has been the subject of repeated hearings.[9]

Clark's Gamble Corp. v. *NLRB*, 422 F.2d 845 (6th Cir.), cert. denied, 400 U.S. 868 (1970); *NLRB* v. *American Cable Systems, Inc.*, 427 F.2d 446 (5th Cir.), cert. denied, 400 U.S. 957 (1970); and *NLRB* v. *Ship Shape Maintenance Co., Inc.*, 474 F.2d 434 (D.C. Cir. 1972), did not involve post-election certifications. Rather, they involved bargaining orders issued pursuant to *Gissel Packing Co., supra*, in which the courts deemed employee turnover and passage of time relevant to the assessment of whether a bargaining order was still proper because a fair election could not be held given the employer's unfair

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[9] *NLRB* v. *St. Regis Paper Co.*, 674 F.2d 104, 107-108 (1st Cir. 1982), did not involve a certification of election results at all. The bargaining order was based on a finding that a new group of employees had been accreted to the certified unit. Furthermore, the remand to consider the continued appropriateness of the bargaining order was based on the fact that the facility in issue had closed down. *Id.* at 109.

labor practices. No case has held that the factors to be considered in that context affect the enforceability of a Board order to bargain with a union certified on the basis of an election—the preferred method of determining whether a union has majority support. *Gissel Packing Co.*, 395 U.S. at 602. See, *e.g.*, *NLRB* v. *Star Color Plate Service, supra.* Conversely, *Peoples Gas System, Inc.* v. *NLRB,* 629 F.2d 35 (D.C. Cir. 1980), involved a bargaining obligation long after the certification year. There the court of appeals sustained the Board's decision that the employer had unlawfully withdrawn recognition from a long-certified union but went on to find a bargaining order unwarranted because, after the unlawful withdrawal, the employees had decisively rejected the union in a fair decertification election. *Id.* at 47, 50.

Finally, in *NLRB* v. *H.P. Hood, Inc.*, 496 F.2d 515, 520 (1st Cir. 1974), the court simply withheld for 60 days entry of an enforcement order, thereby giving the Board, which had indicated that it was willing to reconsider the appropriateness of a bargaining order due to passage of time, an opportunity to do so. Thus, none of these cases calls into question the decision here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Associate General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board

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NATIONAL LABOR RELATIONS BOARD,
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ON PETITION FOR WRIT OF CERTIORARI
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FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE MASTER PRINTERS OF AMERICA AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Of Counsel:
JAN S. AMUNDSON
General Counsel
QUENTIN RIEGEL
Deputy General Counsel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, N.W.
Suite 1500—North Lobby
Washington, D.C. 20004-1703
(202) 637-3058

FRANCIS T. COLEMAN*
MARK D. NELSON
KECK, MAHIN & CATE
1201 New York Avenue, N.W.
Penthouse
Washington, D.C. 20005
(202) 789-3400

Date: February 16, 1990

Attorneys for Amici Curiae
**Counsel of Record*

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TABLE OF AUTHORITIES

STATUTORY PROVISIONS

The following provisions are pertinent to this case:

29 U.S.C. § 157 provides in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . .

29 U.S.C. § 158(a)(5) provides:

> It shall be an unfair labor practice for an employer — (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 159(a) in this title.

29 U.S.C. § 159 provides in pertinent part:

> (a) Representatives designated or selected for the purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:
>
> * * * *
>
> (c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board
>
> > (B)(a) . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice.

29 U.S.C. § 160(c) provides in pertinent part:

> The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument.

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaged in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: . . .

29 U.S.C. § 160(e) provides in pertinent part:

> The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board.

29 U.S.C. § 160(f) provides in pertinent part:

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith trans-

> mitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; . . .

RULE 37 STATEMENT

Pursuant to Rule 37 of this Court, the *amici curiae* have requested and received the written consent of the parties to file the attached brief in support of the petition for certiorari.

INTERESTS OF THE AMICI CURIAE

The *amici curiae* represent over 21,000 employers across the nation who may be adversely affected by the Fourth Circuit Court of Appeals' erroneous enforcement of a National Labor Relations Board bargaining order despite changed circumstances resulting from the Board's own unexcused delay which compel denial of enforcement.

The National Association of Manufacturers of the United States of America ("NAM") is a voluntary business association of over 13,000 companies, employing eighty-five percent of all manufacturing workers and producing over eighty percent of the nation's manufactured goods. The NAM is affiliated with 158,000 additional businesses through its Associations Council and National Industrial Council. The NAM and these councils provide information and other educational services and publi-

cations to employers regarding employer-employee relations and the laws and legislative proposals that pertain to them.

The Master Printers of America ("MPA") is a division of Printing Industries of America, an international not-for-profit trade association, representing commercial printing establishments in the graphic arts industry throughout the U.S. and Canada. MPA itself represents approximately 8,500 members, whose employee work forces are either wholly or partially non-union. MPA is dedicated to serving these members through the development of positive employee relations programs, and making these programs available to its members.

The Fourth Circuit's enforcement of a bargaining order in the face of a significant passage of time and dramatic growth and changes in the voting unit will have a substantial adverse impact on the members of the *amici* organizations. The court's ruling, that an eight-year delay and massive change in the voting unit need not be considered in reviewing a bargaining order, denies the employees of the *amici's* members their right to a representative of their choice under similar circumstances. Moreover, the court's refusal to consider the effect of the delay caused by the Board effectively condones dilatory conduct by the Board, to the detriment of the *amici's* members and their employees. Therefore, the *amici curiae* urge this Court to reject the Fourth Circuit's erroneous enforcement of the Board's bargaining order and require the Board to adopt a consistent and equitable standard for its bargaining orders which effectuates the right of employees to select, or refrain from selecting, a representative.

STATEMENT OF CASE

More than eight years ago, Local 61 of the Baltimore Printing Pressman and Assistants Union ("Union") narrowly won a contested election among fifty-five employees of National Posters, Inc., and National Litho ("employer"). The Regional Director for Region 5 of the National Labor Relations Board dismissed the employer's challenge to a voter ballot and objections regarding material union misrepresentations without a hearing, and certified the union as the representative of employees.

The employer refused to bargain in order to contest the validity of the certification. The Board issued a bargaining order and the employer requested review by the United States Court of Appeals for the Fourth Circuit. The court agreed with the employer that the Board improperly failed to hold a hearing on the challenged ballot.

More than three years after the election, an administrative law judge conducted a hearing on the challenged ballot and ruled the ballot should be counted. The employer filed exceptions to the judge's decision and for two and one-half years the Board failed to rule on these exceptions or the judge's decision. Then, without any explanation for its considerable delay, the Board affirmed the judge's ruling. The Board reopened the record, however, and required a second hearing because the petitioning Union had, in the interim, reaffiliated with a new international union. The Board later concluded that the changes in the union were insufficient in and of themselves to raise a new question concerning representation.

The employer filed a Motion to Reopen the Record or for Reconsideration in order to present evidence of the dramatic expansion of and change in the bargaining unit in light of the Board's decision in *St. Regis Paper Co.*, 285 NLRB No. 39 (1987). The bargaining unit had expanded from the original 55 employees to 137 employees, and only 37 of these employ-

ees were employed at the time of the election. Moreover, 18 of the original 55 employees had left the employer. The Board refused to consider the effect of these changed circumstances and ordered the employer to bargain with the Union.

The Fourth Circuit refused to set aside the Board's bargaining order in spite of the employer's argument regarding the challenged ballot, the union's new affiliation and the significant delay caused by the Board. Moreover, the court ratified the Board's refusal even to consider the massive changes in the voting unit in determining whether a bargaining order was justified.

REASONS FOR GRANTING THE WRIT

I. The Petition for Certiorari Should be Granted Because the Fourth Circuit's Decision Would Impose a Representative Upon Employees for a Considerable Period of Time, Without Their Consent.

This case touches at the very core of the National Labor Relations Act ("Act"). Section 7 of the Act guarantees employees two fundamental rights: the right to select a representative and the right to refrain from selecting a representative.[1] These rights are not effectuated, but are diminished, by imposing a bargaining representative upon employees where the bargaining unit increased in size by almost 300%, where less than one-third of the current employees were employed at the time of the election, and where the election itself was held eight years ago.

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[1] Section 7 of the Act, 29 U.S.C. § 157 (1982), states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activity for mutual aid and or protection, and shall also have the right to refrain from any or all of such activities. . . .

If the Fourth Circuit's decision is not reversed, the employer's employees will be subjected to a union representative they did not choose, for up to four years.[2] This four-year denial of the right to vote on a representative contravenes the Act's preeminent concern with employee free choice. The Board must not be permitted to cause extensive delays with impunity. The eight-year delay in this case is directly attributable to the Board's conduct: its failure to hold a hearing on a challenged ballot and a two and one-half year period during which the Board apparently ignored this case. If the Board is not required to adopt a standard for issuing bargaining orders that gives proper consideration to changed circumstances, such as a significant passage of time and dramatic change in the employee unit, the Section 7 rights of employees will be denied and Board-sponsored delay will be condoned.

II. The Petition for Certiorari Should be Granted so That This Court Can Resolve a Conflict Among the Circuits Regarding the Appropriate Standard for Enforcing Bargaining Orders of the National Labor Relations Board in Light of Substantial Delay And Other Compelling Changed Circumstances.

The Board's decision below ignores its own prior holding in *St. Regis Paper Company* as well as the decisions of numerous courts of appeals, which have held that the passage of time, employee turnover or other changed circumstances may render a bargaining order improper. As further discussed below, the Fourth Circuit erred because it failed to require the Board to follow its own precedent and consider the appropriateness of its bargaining order in the face of the significant passage of time and dramatic expansion and turnover in the unit. In so holding, the court ignored the decisions of at least six other circuits. Further, the court's decision sabotages the

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[2] The union has an irrebuttable presumption of majority status for one year. If the employer and the union enter into a collective bargaining agreement near the end of this one-year period, an election is barred for the term of the contract, up to an additional three years.

fundamental right of employees to select or refrain from selecting a representative of their own choosing. Instead, the Fourth Circuit forces a union upon employees.

Numerous circuits and the Board itself have recognized that bargaining orders are not automatically the appropriate remedy for an employer's refusal to bargain. However, inconsistent standards have been applied for enforcement of bargaining orders depending upon the genesis of the Board's order. This Court should clarify that a bargaining order, regardless of its original justification, can trammel the Section 7 rights of employees where significant delay and massive turnover and change in the bargaining unit have occurred.

The Fourth Circuit erroneously refused to apply principles of equity in reviewing the Board's order. The court mistakenly relied on this Court's holding in *NLRB v. Financial Institution Employees*, 475 U.S. 192 (1986), to create a new standard for reviewing Board bargaining orders. This new standard is wrong: it fails to apply principles of equity and conflicts with the decisions of this Court and the other circuits that have considered the issue. As discussed in greater detail below, the court's new standard is improper. The continued application of equitable principles is essential to ensure that employees' Section 7 rights are effectuated.

A. The Court Below, in Conflict with the Decisions of Other Circuits, Allowed the Board to Ignore the Unreasonable Passage of Time, Dramatic Change in the Bargaining Unit and Other Factors, and Enforced a Bargaining Order That is Not Appropriate.

Numerous courts of appeals have held that the Board must consider substantial passage of time, employee turnover or changed circumstances in determining whether a bargaining order is an appropriate remedy. Contrary to the Fourth Circuit, at least six circuits have refused to enforce Board bargaining orders where a substantial passage of time, dramatic changes or turnover in the bargaining unit, or other significant factors were

present, because to do so would violate the Act's guarantee that employees will be able to choose or reject representation. *See NLRB v. Triplex Manufacturing Co.,* 701 F.2d 703 (7th Cir. 1983); *Mosey Mfg. Co. v. NLRB,* 701 F.2d 610 (7th Cir. 1983); *NLRB v. Connecticut Foundry Co.,* 688 F.2d 871 (2nd Cir. 1983); *NLRB v. H.P. Hood, Inc.,* 496 F.2d 515 (1st Cir. 1974); *NLRB v. American Cable Systems,* 427 F.2d 446 (5th Cir)., *cert. denied,* 400 U.S. 957 (1970); *Clark's Gamble Corp. v. NLRB,* 422 F.2d 845 (6th Cir.), *cert. denied,* 400 U.S. 868 (1970); *Peoples Gas System, v. NLRB,* 629 F.2d 35 (D.C. Cir. 1980).

In *NLRB v. Triplex Mfg. Co.,* 701 F.2d 703 (7th Cir. 1983), the union narrowly won an election in a small unit. The Board certified the results despite the employer's allegations of improper union conduct during the election campaign. Three years after the election, the Seventh Circuit refused to enforce the Board's bargaining order because "due to [the] substantial employee turnover in this relatively small unit, there is a serious question whether a majority of current employees desires representation by the Union." *Triplex Mfg. Co.,* 701 F.2d at 709. To the contrary, the Fourth Circuit in this case ignored the substantial employee turnover in an expanding unit, the substantial delay after the election, and the narrow union victory in a small unit and enforced the bargaining order.

The Seventh Circuit also refused to enforce a Board bargaining order because of significant delay attributable to the Board. In *NLRB v. Mosey Mfg. Co.,* 701 F.2d 610 (7th Cir. 1983), the Seventh Circuit considered the Board's application for enforcement of a bargaining order. The court noted that five years had passed since the election and the delay was caused by the Board's indecision on what standard it should apply to misrepresentations during election campaigns. The court concluded that equity compelled denial of the Board's application for enforcement, stating:

> When a party asking a court to do equity has strung out the proceeding to the point where the court cannot determine whether equitable relief would achieve the legitimate purposes of the suit, which in this case is to give a unit of Mosey's workers the collective bargaining representative of their choice, the court will withhold its assistance. (Citations omitted). The best protection for these workers' freedom of choice would be a prompt new election, which a remand will not accomplish.

Mosey Mfg. Co., 701 F.2d at 613.

While the delay in the case below was substantially longer than the delay in *Mosey* and was also caused by the Board, the Fourth Circuit nevertheless ignored the delay and the contrary ruling in *Mosey*, and enforced the Board's order.

In *NLRB v. H.P. Hood, Inc.*, 496 F.2d 515 (1st Cir. 1974), the employer refused to bargain with the union for the purpose of contesting the validity of the union's certification. While the First Circuit affirmed the Board's conclusion that the employer unlawfully refused to bargain, the court refused to enforce the Board's bargaining order based on the five and one-half year delay since the election. The court stated:

> Even though we have upheld the Board, we think that under the circumstances the Board should have the opportunity prior to outright enforcement of the bargaining order to consider whether entry of the order remains appropriate. . . . While this means an additional lapse of time in these already hoary proceedings, we think fairness will be better served than by immediately locking the parties into a lengthy relationship on the basis of ancient events (footnote omitted).

H.P. Hood, Inc., 496 F.2d at 520.

The Fourth Circuit's decision below also conflicts with this ruling because the Fourth Circuit fails to consider the effect of an even greater passage of time on the propriety of a bargaining order.

In *NLRB v. Connecticut Foundry Co.*, 688 F.2d 871 (2d Cir. 1982), the court refused to enforce a Board bargaining order, citing the four years that had passed since the election and the court's doubt of whether the union still had the support of a majority of the employees. In deciding that "the equitable principles which govern judicial action" require denial of enforcement, the court cited its decision in *NLRB v. Nixon Gear*, 649 F.2d 906, 914 (2d Cir. 1981):

> Other factors also encourage us to avoid any further delay in the disposition of this proceeding. The Union's election victory was very narrow, the labor force at the Company has undoubtedly changed since the election, and there is no way of knowing at this time if the Union enjoys a majority of support.

Connecticut Foundry, 688 F.2d at 881.

Again, the Fourth Circuit's failure to deny enforcement of a bargaining order following eight years of delay directly conflicts with the decision of another circuit.

The D.C. Circuit's decision in *Peoples Gas System v. NLRB*, 629 F.2d 35 (D.C. Cir. 1980) also directly contradicts the Fourth Circuit's ruling. There, the court refused to enforce a bargaining order in light of a five and one-half year delay caused by the Board. The court stated:

> One of the fundamental rights under the Act which the Board is charged with protecting is employees' right to choose their bargaining representative, as well as the "right to refrain" from collective bargaining. (Footnote omitted). Those rights are unjustifiably compromised by the remedy here. We would be far more receptive to the Board's request for enforcement had its decision reflected any balancing of the competing considerations which surface so dramatically on this record; a balancing which is an essential component of any valid exercise of discretion.

Peoples Gas, 629 F.2d at 45.

Not only does the Fourth Circuit's decision conflict with the decisions of other circuits in refusing to consider signifi-

cantly changed circumstances, but it also relied on the erroneous presumption that strike replacement employees support the union in the same ratio as those replaced. *National Posters, Inc. v. NLRB,* 885 F.2d 175, 181 (4th Cir. 1989), citing *Universal Security Instruments v. NLRB,* 649 F.2d 247 (4th Cir. 1981). This presumption has been expressly rejected by the Board and the Fifth Circuit. *Buckley Broadcasting Corp.,* 284 NLRB No. 113 (1987); *Curtin Matheson Scientific v. NLRB,* 859 F.2d 362 (5th Cir. 1988), *cert. granted,* 109 S.Ct. 3212 (1989). Thus, the court's refusal to consider dramatic employee turnover as a basis for refusing to enforce a bargaining order conflicts with the decisions of other circuits and current Board law.

B. The Court Should Resolve the Conflict Among the Circuits and Require the Labor Board to Adopt a Consistent and Equitable Standard to Apply To Bargaining Orders.

There is an apparent diversity of views among the different circuits with regard to the enforcement of Board bargaining orders. One standard apparently exists where the employer has engaged in pervasive improper conduct which prevented the holding of a fair election ("*Gissel*" bargaining orders). Another standard is applied by some courts where the employer's only unfair labor practice was its refusal to bargain (which was generally for the purpose of contesting the union's certification).

In the *Gissel*-type cases, bargaining orders have been frequently denied where there has been a significant passage of time or employee turnover which created a doubt as to the union's majority status. *NLRB v. Amber Delivery Service,* 651 F.2d 57 (1st Cir. 1981); *NLRB v. J. Coty Messenger Service,* 763 F.2d 92 (2d Cir. 1985); *NLRB v. Greensboro News & Record,* 843 F.2d 795 (4th Cir. 1988); *NLRB v. American Cable Systems,* 427 F.2d 446 (5th Cir.), *cert. denied,* 400 U.S. 957 (1970); *Clark's Gamble Corp. v. NLRB,* 422 F.2d 845 (6th Cir.), *cert. denied,* 400 U.S. 868 (1970); *NLRB v. Western*

Drug, 600 F.2d 1234 (9th Cir. 1979); *NLRB v. Ship Shape Maintenance Co.*, 474 F.2d 434 (D.C. Cir. 1972). The courts denied enforcement of bargaining orders in each case because enforcement would have violated the employees' Section 7 rights.

In *NLRB v. Knogo Corp.*, 727 F.2d 55 (2d Cir. 1984), the court succinctly stated the justification for refusing to enforce a bargaining order despite pervasive employer unfair labor practices:

> [A] bargaining order is a drastic remedy, jusitified "only when an election is unlikely to reflect the uncoerced preference of the bargaining unit" .... Thus, even where "hallmark" violations have occurred, a bargaining order may not be appropriate where "significant mitigating circumstances exist" .... Among the possibly mitigating factors the NLRB was obliged to consider were the passage of time and rate of employee turnover since the time of the violations .... We have constantly held that when there has been a large turnover in employees between unfair labor practices and a Board's order, "[t]he effect of a bargaining order could thus easily be to impose upon the employees a union not desired by the majority of them." (Citations omitted).

NLRB v. Knogo Corp., 727 F.2d at 60.

This logic for refusing to enforce *Gissel* bargaining orders should apply equally where, as in this case, bargaining orders are issued based solely on the employer's refusal to bargain with a certified union following an election. In both situations the "effect of a bargaining order could easily be to impose upon the employees a union not desired by a majority of them." *Knogo Corp., Id.*

Some courts have applied a *stricter* standard in non-*Gissel* cases and refused to consider the passage of time or employee turnover. *See Bridgeport Fittings, Inc. v. NLRB*, 877 F.2d 180 (2d Cir. 1989); *NLRB v. Star Color Plate Service*, 843 F.2d 1507 (2d Cir.), *cert. denied*, 109 S.Ct. U.S. 81 (1988); *NLRB v. Parents and Friends*, 879 F.2d 1442 (7th Cir. 1989). To the

contrary, other courts have denied enforcement in non-*Gissel* cases based on the passage of time and employee turnover. *NLRB v. Triplex Mfg. Co.*, 710 F.2d 703 (7th Cir. 1983); *Peoples Gas System v. NLRB*, 629 F.2d 35 (D.C. Cir. 1980); *NLRB v. Nixon Gear*, 649 F.2d 906 (2d Cir. 1981). It is inequitable and contrary to the rights of employees under the Act to apply a more stringent standard to bargaining orders where an employer has not committed egregious unfair labor practices but has only refused to bargain. Where there is a significant passage of time and dramatic employee turnover, enforcement of a bargaining order either is or is not appropriate without regard to the underlying basis for the order. To assure employees the fullest freedom to select their own bargaining representative, mitigating factors such as the passage of time and employee turnover should be considered in determining whether to enforce any Board bargaining order.

The Board's decision below ignores its own previous ruling that a bargaining order may not be an appropriate remedy for an employer's refusal to bargain with a certified union. In *St. Regis Paper Company*, 285 NLRB No. 39 (1987), the Board on remand from the First Circuit[3] rescinded its original bargaining order based on the passage of more than four years and "significant changed circumstances" in the employer's operations. The Fourth Circuit has improperly allowed the Board to ignore its prior decision in *St. Regis Paper* as well as the decisions of numerous circuits in refusing to consider compelling changed circumstances.

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[3] *NLRB v. St. Regis Paper Co.*, 674 F.2d 104 (1st Cir. 1982).

C. *The Fourth Circuit Erroneously Applied the Holding of this Court in* NLRB v. Financial Institution Employees *to Preclude Application of Principles of Equity to Enforcement of Board Bargaining Orders, In Conflict With the Decisions of Other Circuits.*

The Fourth Circuit departed from the well-established doctrine of applying equitable principles to Board bargaining orders. The court's decision incorrectly reads this Court's ruling in *NLRB v. Financial Institution Employees,* 475 U.S. 192 (1986), and is contrary to the holdings of other courts of Appeals. *See NLRB v. Pace Oldsmobile,* 739 F.2d 108 (2d Cir. 1984); *NLRB v. American Cable Systems,* 427 F.2d 446 (5th Cir.); *cert. denied,* 400 U.S. 957 (1970); *Impact Industries v. NLRB,* 847 F.2d 379 (7th Cir. 1988); *NLRB v. Ship Shape Maintenance Co.,* 474 F.2d 434 (D.C. 1972). In conflict with this Court and other courts of appeals, the Fourth Circuit has established an unprecedented and improper standard for reviewing Board enforcement requests.

In *NLRB v. Financial Institution Employees,* this Court addressed whether the Board exceeded its authority when it ruled that all nonunion members of a bargaining unit must be permitted to vote in the union's decision to affiliate with another union. This Court held that "the Board exceeded its authority under the Act in requiring that nonunion employees be allowed to vote for affiliation before it would order the employer to bargain with the affiliated union." *Financial Institution Employees,* 475 U.S. at 209. In *dicta,* the Court stated that a union affiliation decision does not automatically raise a question concerning representation. Erroneously applying this language to the case before it, the Fourth Circuit held that changed circumstances such as employee turnover or significant passage of time will affect the Board's bargaining order only if the employer can " 'demonstrate by objective considerations that it has some reasonable grounds for believing that the union has lost its majority status.' " *National Posters, Inc. v. NLRB,* 885 F.2d 175, 181 (4th Cir. 1989) (*National Posters II*). In

adopting this unwarranted standard, the Fourth Circuit admitted its ruling could not be distinguished from the contrary decisions of other circuits.[4] Until *National Posters II*, equity principles have been consistently applied by this Court and the circuits, including the Fourth Circuit, in reviewing the Board requests for enforcement of bargaining orders. *NLRB v. Pace Oldsmobile*, 739 F.2d 108 (2d Cir. 1984); *NLRB v. Greensboro News & Record*, 843 F.2d 795 (4th Cir. 1988); *NLRB v. Parents and Friends*, 879 F.2d 1442 (7th Cir. 1989). Indeed, this Court has clearly stated its position on the issue:

> The jurisdiction to review rulings of the Labor Relations Board is vested in a court with equity powers, and while the Court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles of judicial action.

Ford Motor Co. v. NLRB, 305 U.S. 364, 373 (1939).

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[4] The court dismissed the numerous conflicting decisions of other circuits without analysis: "[W]ithout attempting to further distinguish the decisions of our sister circuits, though, we hold that NPI's challenge must be analyzed under the principles set forth in *Financial Institution Employees, supra*." However, nowhere in the decision is there an *initial* attempt to distinguish those decisions.

CONCLUSION

This Court has not considered whether enforcement of a Board bargaining order is consistent with the purposes of the Act where there are significant changed circumstances, including a significant passage of time from the election or bargaining order and dramatic expansion, turnover or change in the bargaining unit.

The facts of this case are compelling, and are likely to reoccur absent review by this Court. Other unfortunate employers (and their employees) have found themselves similarly situated merely by complying with federal labor law during an election campaign, exercising their right to contest the validity of the union's certification in the courts, enduring lengthy and unexplained delays by the Board, and experiencing a tremendous expansion and turnover in the original voting unit. Protection of the rights of employees requires reversal of the Fourth Circuit's ruling.

In light of the conflict among the circuits, the Board's failure to consistently address this issue and the national importance of this issue, the *amici* respectfully request that the Court issue a writ of certiorari to review the judgment and opinions of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

Of Counsel:
JAN S. AMUNDSON
General Counsel
QUENTIN RIEGEL
Deputy General Counsel
NATIONAL ASSOCIATION
OF MANUFACTURERS
1331 Pennsylvania Ave. N.W.
Suite 1500-North Lobby
Washington, D.C. 20004-1703
(202) 637-3058

FRANCIS T. COLEMAN*
MARK D. NELSON
KECK, MAHIN & CATE
Penthouse
1201 New York Avenue,
N.W.
Washington, D.C. 20005
(202) 789-3400

Attorneys for Amici Curiae

**Counsel of Record*